SUPREME COURT, U.S.
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No. 01-1078 JUN 14 2002

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In The Supreme Court of the United States

VICTORIA SMYTH, et al.,

Petitioners,

v.

SONIA RIVERO,
Commissioner of the Virginia
Department of Social Services,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001), in an action seeking only prospective equitable relief, winning a preliminary injunction based on a ruling that the defendant has violated the law, which is followed by the defendant's cessation of the illegal conduct, qualifies a plaintiff as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §1988?

2. Whether, under *Buckhannon*, obtaining a final order from the court, entered over the objection of the defendant, declaring that the parties have entered into a binding agreement granting plaintiff part of the relief sought in the action qualifies a plaintiff as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §1988?

3. Whether, under *Buckhannon*, obtaining a legally enforceable settlement agreement granting the plaintiff part of the relief sought in the action qualifies a plaintiff as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §1988?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are:

Petitioners: Victoria Smith and her daughter, Angela Smyth; and
Patricia Montgomery and her son, Casey Montgomery.

The Petitioners are individuals who received Temporary Assistance for Needy Families (formerly Aid to Families with Dependent Children) under Title IV-A of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, pursuant to a preliminary injunction entered by the United States District Court for the Western District of Virginia. The district court permitted Petitioners to proceed in this action using pseudonyms (*i.e.*, Smyth and Montgomery) in order to protect the privacy of the minor children.

Respondent: Sonia Rivero, Commissioner of the Virginia Department of Social Services.

The original defendant in this action was Clarence Carter, who was then the Commissioner of the Virginia Department of Social Services. Ms. Rivero was substituted for Mr. Carter when she assumed her duties as Commissioner.

None of the parties is a corporation.

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to the rules of this Court, Petitioners, Victoria Smyth and her daughter, Angela Smyth, and Patricia Montgomery and her son, Casey Montgomery, by counsel, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The following opinions and orders have been entered in this case:

Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002) (reversing district court's award of attorneys' fees) (Appendix [hereinafter "App."] at A-1);

Smyth v. Carter, No. 5:96CV00089, 2000 U.S. Dist.

LEXIS 15426 (W.D. Va. Oct. 17, 2000) (award of attorneys' fees and costs) (App. at A-29);

Smyth v. Carter, 88 F. Supp. 2d 567 (W.D. Va. Feb. 4, 2000) (final judgment) (App. at A-55); and

Smyth v. Carter, 168 F.R.D. 28 (W.D. Va. 1996) (granting preliminary injunction) (App. at A-67).

JURISDICTION

The judgment to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on February 21, 2002 (App. at A-1). A petition for rehearing and rehearing en banc was denied on March 19, 2002 (App. at A-79).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTES AND REGULATIONS

This case involves 42 U.S.C. § 1988(b):

> **§ 1988. Proceedings in vindication of civil rights**
>
> . . . .
>
> **(b) Attorney's fees.** In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and

> Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

This action was filed on May 30, 1996, under 42 U.S.C. § 1983, challenging a policy of the Virginia Commissioner of Social Services that disqualified illegitimate children living with their mothers from receiving cash assistance under the Temporary Assistance to Needy Families (TANF) program unless the mother could provide the first and last name of the child's father or of all men with whom she had sexual intercourse who might be the father.[1] This requirement applied even in those situations where the mother did not know the full name of the father of her child and had no way to find out that information. For needy illegitimate children whose mothers do not know their father's first and last name, the Commissioner's absolute paternity identification policy placed an insurmountable

[1] When this case was filed, the program's name was Aid to Families with Dependent Children or AFDC. In Virginia, the name was changed to TANF on February 1, 1997. For purposes of consistency, the program will be referred to throughout as TANF.

barrier between the family and the minimal assistance necessary for the family's survival.

Since at least 1975, adult caretakers of children receiving welfare benefits have been required to cooperate in identifying the fathers of their children so that child support can be collected for the children. *See Lascaris v. Shirley*, 420 U.S. 730 (1975). "Cooperation," however, was defined by federal regulations in its ordinary sense to require the caretaker to provide all available information concerning the father. A caretaker who did not know a father's identity could be found eligible if she attested to her lack of information under penalty of perjury. 45 C.F.R. § 232.12(b)(3) (1996). The Commissioner's absolute paternity identification policy, which was implemented on July 1, 1995, changed this long-standing rule in a manner not permitted by the federal regulations by terminating TANF benefits for the entire family in those cases where the mother was unable to identify the father of any child living in the household.[2] App. at A-3 to A-4, A-55 to A-56, A-67 to A-68, A-71 to A-73.

In May 1996, Plaintiffs were notified that their TANF benefits would be terminated in June because they had failed to provide the full names of the fathers of their children. In each case, it is undisputed that Plaintiff mothers did not, in fact, know the father's name; however, in each case they were found guilty of "non-cooperation" pursuant to the Commissioner's new policy and informed that their family's benefits would be terminated. This lawsuit was filed on May 30, 1996, challenging the Commissioner's policy as inconsistent with applicable federal law and with the Equal Protection Clause of the Fourteenth Amendment. The Plaintiffs sought injunctive relief to stop the Commissioner from terminating their benefits and the benefits of others

[2] There were certain exceptions to the policy not relevant here (*e.g.*, domestic violence, incest, rape, adoption).

who were similarly situated. App. at A-3 to A-4, A-30.

In this action, the Plaintiffs were represented by Edward M. Wayland, a private practitioner, and Steven L. Myers of the Virginia Poverty Law Center. Normally, this case would have been handled by staff attorneys working for programs in Virginia funded by the federal Legal Services Corporation. At the time the case arose, however, federal law had recently been changed to prohibit legal services lawyers from working on cases which challenged welfare reform initiatives.[3] This was such a case. Mr. Wayland was recruited to act in this case because these restrictions precluded legal services lawyers from doing so, and he had a background in public benefits programs. In his declaration in support of his fee petition, Mr. Wayland advised the district court that he agreed to work on this matter because he was aware of the federal restrictions, and he knew how hard it would be to find other counsel. While he would not be paid for his work by the Plaintiffs, he understood that attorneys' fees might be available under 42 U.S.C. § 1988 if they prevailed. He stated that he would not have been able to accept the case without that possibility.

After the suit was filed, the parties engaged in extensive expedited discovery and followed an expedited briefing schedule in the weeks prior to the preliminary injunction hearing, which was held on June 25, 1996. After the hearing, the district court granted the preliminary injunction. App. at A-77. The court found, among other things, that the Commissioner's policy of denying benefits for non-cooperation due to a claimant's inability to identify her child's father contradicted the plain language of the

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[3] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53. The section dealing with welfare issues is in §504(a)(16). This provision was eventually declared unconstitutional by this Court in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001).

applicable federal regulations. *Smyth v. Carter*, 168 F.R.D. 28, 32 (W.D. Va. 1996) (App. at A-72). The court denied Plaintiffs' request for class certification. Because of the preliminary injunction, the Plaintiffs continued to receive their TANF benefits.

On August 5, 1996, Virginia received a waiver from the United States Department of Health and Human Services, which permitted the Commonwealth to have a different definition of "cooperation" than that required by federal law. New state regulations under this waiver went into effect on February 1, 1997. For benefits paid after that date, the federal cooperation regulation no longer applied to Plaintiffs' claims, and their federal statutory and regulatory arguments no longer were available to challenge the paternity identification policy. The Plaintiffs continued to challenge the policy on Equal Protection grounds, arguing that it was irrational and unfair to pay benefits to needy children who could identify their fathers, while denying benefits to needy illegitimate children who could not.

The Plaintiffs filed a motion for summary judgment, which was thoroughly briefed by both parties. App. at A-5, A-31. In one of her briefs, the Commissioner announced that she was waiving any claim to re-payment of benefits paid under the preliminary injunction up until February 1, 1997, when the new regulations went into effect. Oral argument on the summary judgment motion was scheduled for September 12, 1997. The day before oral argument, the Commissioner requested a continuance to consider revising the policy to make it apply prospectively only, thereby exempting Plaintiffs and other children born before May 1996. The Plaintiffs agreed to the postponement in exchange for the Commissioner's agreement not to seek repayment of the TANF benefits paid after February 1, 1997, regardless of whether the Plaintiffs prevailed on their Equal Protection claims or not. App. at A-31, A-58 to A-60.

Ultimately, the Commissioner did amend the absolute paternity identification policy, making its application prospective only. As a result of this revision, which was effective August 1, 1998, the policy no longer applies to a child born before May 1, 1996, whose mother does not know the name of his father, so long as the mother attests under penalty of perjury to her lack of information regarding paternity. Both of the Plaintiff children in this case were born prior to that date.[4] App. at A-6.

Because the policy no longer applies to the Plaintiffs and their children, Plaintiffs agreed that the case could be dismissed provided the district court's judgment incorporated the parties' agreement barring the Commissioner from seeking repayment of benefits paid to Plaintiffs under the former policy. Despite the agreement entered into on this point, the Commissioner now took the position that there had been no agreement. She stated that she would not seek to collect these benefits, but as a voluntary waiver rather than as part of a binding commitment. After considering additional briefing, argument and admissions by counsel for the Commissioner, in its final judgment, the district court found that the parties had entered into a binding agreement:

> [T]he defendant may not seek repayment of TANF benefits paid to the plaintiffs under the prior policy. The defendant, in his Memorandum in Opposition to the Plaintiff's Motion for Summary Judgment, made an initial

[4] As were hundreds of other children on the TANF caseload. According to the Commissioner's answers to interrogatories, during the first ten months the new policy was in effect, from July 1995 to April 1996, 358 families, containing 597 children, had their benefits cut off because of the failure to identify the absent parent. Further, the Commissioner stated that "As of April 1996, an estimated 4117 [TANF] cases had at least one unnamed absent parent, comprising 6.4% of the total [TANF] caseload."

> waiver of the repayment of TANF benefits paid before February 1, 1997. By agreement of the parties and in exchange for a continuation of the summary judgment hearing, the defendant extended that waiver so as to include all TANF benefits paid through August 1, 1998, at which time the revised paternity identification policy went into effect.

Smyth v. Carter, 88 F.Supp. 2d 567, 568-70, 572 (W.D. Va. 2000) (App. at A-64 to A-65, A-60). The district court retained jurisdiction over the case to decide the issue of attorneys' fees. *Id.*, 88 F.Supp. 2d at 571, 572 (App. at A-63, A-65).

Following entry of the district court's judgment, Plaintiffs submitted their motion for attorneys' fees and costs, along with substantial supporting evidence. The Commissioner submitted a legal memorandum in opposition to Plaintiffs' fee request, but no supporting evidence. After considering Plaintiffs' evidence and the parties' briefs and argument, the district court awarded Plaintiffs $195,074.54 in attorneys' fees and costs. *Smyth v. Carter,* 2000 U.S. Dist. LEXIS 15426 (W.D. Va. Oct. 17, 2000) (App. at A-29, A-51). The district court concluded that the Plaintiffs are prevailing parties under 42 U.S.C. § 1988(b) and, after applying the relevant factors under *Johnson v. Railway Express, Inc,* 488 F.2d 714 (5th Cir. 1974), the district court found that Plaintiffs' fee request was reasonable with respect to both hourly rates and time billed. *Id.*

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court's award of attorneys' fees. *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002) (App. at A-1). Citing *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources,* 532 U.S. 598 (2001), the Court held that the

plaintiffs are not prevailing parties within the meaning of 42 U.S.C. § 1988. Based on its reading of *Buckhannon*, the Fourth Circuit held that neither a preliminary injunction nor a private settlement is a proper basis for prevailing party status, and the Court concluded that the district court's judgment in this case may not properly be characterized as a "consent decree" because it neither expressly incorporated the parties' partial settlement agreement nor retained jurisdiction to enforce such agreement. *Smyth, supra*, 282 F.3d at 277 n.9, 279, 285 (App. at A-14 to A-15, A-17, A-27 to A-28).

REASONS FOR GRANTING THE WRIT

A. In an action seeking only prospective equitable relief, winning a preliminary injunction based on a ruling that the defendant has violated the law, which is followed by the defendant's cessation of the illegal conduct, should qualify a plaintiff as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. § 1988. There is a split in the circuits on this issue, which should be resolved.

Following extensive discovery and a lengthy hearing during which the Defendant Commissioner vigorously defended the contested policy, in June 1996, the district court entered a preliminary injunction in this case requiring the Defendant Commissioner to continue payment of monthly benefits to the Plaintiffs. In assessing Plaintiffs' likelihood of success, the district court unambiguously stated its legal conclusion that the Commissioner's policy was "impossible to square" with the applicable federal regulations. *Smyth v. Carter*, 168 F.R.D. 28, 32 (W.D.Va. 1996) (App. at A-67, A-73). The Defendant Commissioner subsequently revised the

policy and agreed not to seek recovery of benefits paid to Plaintiffs prior to the revision.

Courts have long recognized that, in a proper case, a plaintiff who secures a preliminary injunction can be a prevailing party for purposes of attorneys' fees, even in the absence of other relief from the court. *See, e.g. Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982) (preliminary injunction granted to require AFDC benefits to continue pending the outcome of the litigation, based on finding that plaintiffs were legally entitled to benefits, made plaintiffs prevailing parties even though state budget change made final judgment unnecessary); *National Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999) (plaintiffs who had obtained an injunction were prevailing parties even though case subsequently declared moot because of change in law); *Haley v. Pataki*, 106 F.3d 478, 483-84 (2d Cir. 1997) (plaintiffs who obtained a preliminary injunction based on a determination on the merits were prevailing parties even though a final judgment was not entered because defendant subsequently changed its conduct); *Taylor v. Ft. Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987) ("a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees"); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) ("The preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. Appellees succeeded on a 'significant issue in litigation which achieve(d) . . . the benefit the parties sought in bringing suit.' "); *Dahlem v. Bd. of Ed. of Denver Public Schools*, 901 F.2d 1508 (10th Cir. 1990) (student prevailed when preliminary injunction allowed him to play football, even though no final judgment entered because he had graduated and the case was therefore moot).

As recently as June 4, 2002, the First Circuit reaffirmed the correctness of this view in *Race v. Toledo-Davila*, No. 01-2037, 2002 U.S. App. LEXIS 10686 (1st Cir. June 4, 2002). In *Race*, the plaintiff obtained a preliminary injunction, but his request for attorney's fees was denied. The Court of Appeals affirmed, noting that the district court had stated "explicitly that it did not address the merits of the plaintiff's claim" in granting the preliminary injunction. *Id.* at 4. The court noted, however, that an individual who obtains preliminary relief based on the merits of at least some of this claims would be entitled to attorney's fees. *Id.* at 5.

Prior to the decision in the present case, this was also the rule in the Fourth Circuit. In *S-1 and S-2 v. State Board of Ed. of North Carolina*, 6 F.3d 160, 170 n.3 (4th Cir. 1993) (Wilkinson, J., dissenting) (adopted by the Court sitting *en banc* as its opinion, 21 F.3d 49 (1994)), for example, Judge Wilkinson referred with approval to "the principle that when a plaintiff is successful in obtaining a preliminary injunction based on its probability of success, the defendant's voluntary cessation of unlawful conduct need not deprive plaintiffs of prevailing party status." In *Virginia Society for Human Life, Inc. v. Caldwell*, No. 98-2565 at 26-27, 1999 U.S. App. LEXIS 18622 (4th Cir. 1999),[5] five years after *S-1*, the Fourth Circuit reiterated Judge Wilkinson's point:

> [A] plaintiff may obtain prevailing party status under 42 U.S.C. §1988 without obtaining a favorable final judgment in its challenge to a defendant's alleged unlawful conduct if the plaintiff shows that it obtained a preliminary injunction based upon the probability of success on the merits and, further, that the defendant

[5] This is an unpublished opinion. Copies of this opinion have been lodged with the Clerk and served on opposing counsel.

> voluntarily ceased unlawful conduct in response to the plaintiff's litigation against the defendant. [Citing Judge Wilkinson's footnote in *S-1*.] The plaintiff must show that it was unable to achieve a final determination on the merits of its challenge to the defendant's alleged unlawful conduct because the defendant voluntarily ceased unlawful conduct in response to the plaintiff's litigation against the defendant, thereby depriving the plaintiff of its opportunity to obtain a final determination on the merits.

This is exactly the situation in the present case. The district court issued a preliminary injunction on the grounds that the Commissioner's policy was inconsistent with applicable federal law. Later in the litigation, the Commissioner chose not to fight this ruling, and "voluntarily" abandoned whatever claim she might have had to recoup the benefits Plaintiffs received under the preliminary injunction from future TANF payments. Had she not done so, there is no question that the district court would have entered a final judgment on this issue in Plaintiffs' favor, at least as to the period prior to February 1, 1997. Plaintiffs were deprived of the opportunity to obtain this judgment because the Commissioner capitulated. Yet the Fourth Circuit held that this victory, based on a ruling by the district court in their favor, did not make them prevailing parties. Clearly, this is wrong as a matter of law. It is also inconsistent with the relevant precedents from the other Circuits, from the Supreme Court, and even from the Fourth Circuit's own prior case law.

The Fourth Circuit cited this Court's recent decision in *Buckhannon Board and Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001), in support of its new position. In *Buckhannon*, this Court

rejected the use of the "catalyst theory" in determining whether a party was a "prevailing party" and thus entitled to fees under 42 U.S.C. §1988. Yet it is clear that the Fourth Circuit's prior position on preliminary injunctions, as articulated in *S-1* and *Caldwell*, was not based on the "catalyst theory." *S-1* was itself the case in which the Fourth Circuit first announced that it would no longer recognize the "catalyst theory." *Caldwell* was written five years after *S-1* by a court which continued to hold to that view. It is clear, therefore, that these decisions were written by a court that had rejected the catalyst theory. *Cf. Coalition for Basic Human Needs v. King, supra,* 691 F.2d at 599-602 (preliminary relief on some parts of a plaintiff's claim may entitle him to prevailing party status; this situation distinguished from "catalyst" cases).[6]

Despite this, the Fourth Circuit incorrectly expanded this Court's decision in *Buckhannon* and erroneously concluded that a preliminary injunction can never qualify a party as a prevailing party for purposes of attorneys' fees. *Smyth v. Rivero*, 282 F.3d 268, 276-277 (4th Cir. 2002) (App. at A-1, A-11 to A-15). *Buckhannon* does not, however, support this conclusion.

The holding of *Buckhannon*, as the Supreme Court repeatedly made clear, is that a plaintiff is not a prevailing party in the absence of any court-ordered relief.[7] In rejecting the "catalyst theory", the Court stated,

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[6] The First Circuit recently re-affirmed that, post-*Buckhannon*, the *King* decision remains valid. *Race v. Toledo-Davila, supra.*

[7] The Court cited a number of circuit court decisions from other circuits upholding the use of the "catalyst theory". 532 U.S. at 602 n.3. As these decisions make clear, each of these circuits regarded the "catalyst theory" as applicable only where there had been no grant of judicial relief at all, and where the change in the defendant's behavior was the result merely of the suit being filed. *Accord, Coalition for Basic Human Needs v. King, supra*, 691 F.2d at 599-602.

> This view that a "prevailing party" is one who has been awarded *some relief by the court* can be distilled from our prior cases.

532 U.S. at 603 (emphasis added). The Court also said,

> [The "catalyst" theory] allows an award where there is no judicially sanctioned change in the legal relationship of the parties."

Id., at 605. And

> Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.

Id. And

> We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" *without obtaining any judicial relief.*

Id., at 606 (emphasis added).

From these statements, it is clear that the "catalyst theory" the Court rejected in *Buckhannon* was the theory that a plaintiff could prevail without obtaining any relief from the court. This is in marked contrast with the situation where a plaintiff has obtained a preliminary injunction which, as in the present case, clearly and unambiguously rules that the

defendant is engaging in unlawful conduct. In such a case, the defendant's cessation of his unlawful actions following entry of the judge's order is presumably what we would all want. Yet the plaintiff, who has been forced by the defendant to go to the trouble and expense of winning the preliminary injunction, is, under the Fourth Circuit's decision, denied prevailing party status and, therefore, fees, despite the fact that the court has granted the relief sought in the litigation.

In reaching its erroneous conclusion that a preliminary injunction is not a proper basis for prevailing party status, the Fourth Circuit compared the preliminary injunction in this case to the facts in *Buckhannon* and in *Hewitt v. Helms*, 482 U.S. 755 (1987). App. at A-11. There are, however, significant differences between the preliminary injunction entered in the present case and the situation in the cases cited by the Fourth Circuit. In *Buckhannon*, the defendants voluntarily agreed to refrain from the challenged action during the course of the litigation. 532 U.S. at 601. The matter was resolved by a legislative change, and the trial court never entered an order granting any relief to anyone. In *Hewitt*, the plaintiff also "obtained no relief". 482 U.S. at 760. Despite this, he claimed to be a prevailing party merely because, prior to losing in the trial court, an appellate court ruled that his claim stated a cause of action and should not have been dismissed.

The Fourth Circuit concluded that "[a] preliminary injunction such as that granted to Smyth and Montgomery below is closely analogous, for these purposes, to the examples of judicial relief deemed insufficient in *Buckhannon*." *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002) (App. at A-1, A-11). Yet the preliminary injunction in this case was dramatically different, in its role in the litigation and in its effect on the parties, from the events described in *Buckhannon* and *Hewitt*. The preliminary injunction in this case contained a ruling on the central legal

issue, the validity of the challenged policy. It ordered the Commissioner to continue paying benefits, which was the plaintiffs' goal in bringing the lawsuit in the first instance. And it was entered by the court over the vigorous objection of the defendant following a hearing. Contrary to the conclusion of the Fourth Circuit in *Smyth*, 282 F.3d at 275-76 (citing *Buckhannon* and *Hewitt*), that is in fact "the stuff of which legal victories are made." *See Race v. Toledo-Davila, supra* (post-*Buckhannon* case which reaffirmed that an individual who obtains preliminary relief based on the merits of at least some of his claims may be entitled to attorney's fees).

The Fourth Circuit's conclusion that a preliminary injunction can never make a plaintiff a prevailing party is contrary to the prior holdings of that court. It is contrary to the rule in other Circuits. And it is an extraordinary and unjustified extension of *Buckhannon* that wrongs successful plaintiffs and rewards obstructive defendants who know when to bail out. Furthermore, in cases where damages are unavailable, including cases such as this contesting the legality of state action, the Fourth Circuit's ruling will make it much more difficult for ordinary people to find attorneys willing to take their cases. Such a result directly undermines the fundamental purposes of the Civil Rights Attorney's Fees Award Act.

Accordingly, this Court should review and reverse the Fourth Circuit's decision in the present case. Entry of a preliminary injunction based on a ruling that the defendant has violated the law, an injunction which grants the plaintiff the relief sought in the litigation, followed by voluntary compliance by the defendant, should certainly be sufficient to qualify a plaintiff as a "prevailing party" for purposes of awarding attorneys' fees under 42 U.S.C. § 1988.

B. A plaintiff who obtains a final order from the court declaring that the parties have entered into a binding agreement granting plaintiff part of the relief sought in the action should qualify as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §1988.

After the Defendant Commissioner revised the contested policy so that it no longer applied to Plaintiffs, Plaintiffs did not contest a dismissal of this action provided the district court's judgment incorporated the parties' agreement barring the Commissioner from seeking repayment of benefits paid to Plaintiffs under the former policy. Despite the agreement entered into on this point, the Commissioner then took the position that there had been no agreement. She stated that she would not seek to collect benefits paid pursuant to the preliminary injunction while the contested policy was in effect, but as a voluntary waiver rather than as part of a legally binding commitment.

Following a chambers hearing and additional briefing, the district court ruled otherwise. After noting that the Commonwealth claimed that its waiver of repayment was "allegedly without agreement from the plaintiffs and without any return of consideration," the district court ruled:

> [T]his court finds that the parties did enter into an agreement where the defendant would receive a non-contested continuance in return for a waiver of seeking benefits paid to the plaintiffs between February, 1997 and the date the policy was revised to exclude the plaintiffs. Accordingly, the dismissal order will declare that the defendant is unable to seek repayment of TANF benefits because of the binding agreement between the parties.

Smyth v. Carter, 88 F. Supp. 2d 567, 570 (W.D. Va. 2000) (App. at A-55. A-60). Accordingly, the district court's judgment states:

> The court further finds that the defendant may not seek repayment of TANF benefits paid to the plaintiffs under the prior policy.

Id., 88 F. Supp. 2d at 572 (App. at A-65).

In other words, the district court's order dismissing this case as moot declared that, contrary to the position of the Defendant Commissioner, there was in fact an agreement between the parties and the Commissioner was legally bound by its terms. Indeed, it is only because the Commissioner was legally bound to allow the Plaintiffs to keep their benefits that the district court could regard the case as moot. Otherwise, as the district court pointed out, it would have been required to rule on Plaintiffs' constitutional claim because, in the absence of an agreement, the Commissioner would have had a legal obligation to seek repayment of benefits paid to Plaintiffs before the Commissioner's former paternity identification policy was revised. *Smyth v. Carter, supra*, 88 F. Supp. 2d at 568 (App. at A-57 to A-59).

The order declaring the case moot did not, therefore, merely recite the fact of an agreement between the parties. It included a legal and factual ruling on a disputed matter, akin to a declaratory judgment, entered over the Defendant Commissioner's vigorous objection.[8] This ruling by the district court that the Defendant Commissioner was legally

[8] The district court's Memorandum Opinion states, after concluding that the Commissioner was bound by her agreement, that "Accordingly, the dismissal order will *declare* that the defendant is unable to seek repayment of TANF benefits because of the binding agreement between the parties." *Smyth v. Carter*, 88 F. Supp. 2d 567, 570 (W.D. Va. 2000) (App. at A-55, A-60) (emphasis added).

barred from seeking to recover the public assistance payments which were at issue in this case granted Plaintiffs important judicial relief and constituted "a judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. Under *Buckhannon*, therefore, this order of the district court qualifies Plaintiffs as prevailing parties for purposes of attorneys' fees.

C. A plaintiff who obtains a legally enforceable settlement agreement granting the plaintiff part of the relief sought in the action should qualify as the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §1988. There is a split in the circuits on this issue, which should be resolved.

Even if the district court's judgment dismissing the present case had not included a finding concerning the existence of an enforceable settlement agreement, such agreement is, by itself, a proper basis for conferring prevailing party status under 42 U.S.C. § 1988. The United States Court of Appeals for the Ninth Circuit held in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002), that, despite the contrary suggestion in *Buckhannon*, 532 U.S. at 604 n.7, a private settlement could be a basis for granting prevailing party status. Merely retaining jurisdiction to decide attorneys' fees provides sufficient judicial oversight of the parties' settlement to satisfy *Buckhannon's* requirement of court supervision. *Accord Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 45 (D.D.C. 2002). *But see Akinseye v. District of Columbia*, 193 F. Supp. 2d 134, 137-39 (D.D.C. 2002).

In the present case, the district court's final judgment of February 4, 2000, recognized the settlement agreement between the parties under which the Plaintiffs were permitted

to keep all TANF benefits they had received under the court's preliminary injunction during the course of the litigation. That order also specifically reserved jurisdiction to consider Plaintiffs' petition for an award of attorneys' fees. The settlement agreement in this matter is, therefore, sufficient under *Barrios* to make Plaintiffs prevailing parties, since it obtained for them part of the relief they were seeking in the litigation. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("The plaintiff must obtain an enforceable judgment against a defendant from whom fees are sought. . . or comparable relief through a consent decree *or settlement*" (emphasis added).

In contrast to the Ninth Circuit, both the Fourth Circuit in the present case and the Second Circuit in *N.Y. State Federation of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Commission*, 272 F.3d 154, 158-59 (2d Cir. 2001), have held since *Buckhannon* that a private settlement may no longer provide an appropriate basis for prevailing party status. Thus, the circuits are split. *See, e.g., American Disability Association, Inc. v. Chmielarz*, No. 01-15366 at 9 n.2, 2002 U.S. App. LEXIS 8064 (11th Cir. May 1, 2002).[9] Accordingly, this Court should grant certiorari to review the Fourth Circuit's decision in this case and clarify that under *Buckhannon* a private settlement can still support prevailing party status where the court retains jurisdiction to decide attorneys' fees.

[9]This opinion has not been published. Copies of this opinion have been lodged with the Clerk and served on opposing counsel.

CONCLUSION

This case presents issues of extraordinary importance. What this Court does with them will directly affect the ability of ordinary people to use the courts to vindicate their rights when they have been wronged. In addition, the Fourth Circuit's decision, if it is allowed to stand, will discourage litigants from settling cases short of a final judgment and will therefore add to the burdens which must be faced by both litigants and the courts.

The circuits are split on the question of whether a preliminary injunction can ever support a ruling that a plaintiff is a prevailing party. The Fourth Circuit held in this case that it cannot, in conflict with the decisions of other circuits. This Court has yet to decide this issue. In addition, the Fourth Circuit's holding in this case is inconsistent with this Court's attorneys' fees decisions, including *Buckhannon*, because the Fourth Circuit denied prevailing party status even though the Plaintiffs had obtained court orders granting them the relief they sought and changing the legal relationship between the parties. Finally, the circuits are split on whether a private settlement can ever support a finding that a plaintiff is a prevailing party, and this issue also requires resolution by this Court.

The Plaintiffs obtained significant relief in this action, and that relief came to them as a direct result of rulings by the district court entered over the vigorous objections of the Defendant Commissioner. By any standard of law and common sense, the Plaintiffs are the prevailing parties.

Accordingly, this Court should grant a writ of certiorari to review the Fourth Circuit's decision in this matter and should rule that the Plaintiffs are prevailing parties and are therefore entitled to an award of attorneys' fees under 42 U.S.C. § 1988.

Respectfully submitted,

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Attorneys for Petitioners

June 13, 2002

No. _____

In The Supreme Court of the United States

VICTORIA SMYTH, et al.,

Petitioners,

v.

SONIA RIVERO,
Commissioner of the Virginia Department of Social Services,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2453

VICTORIA SMYTH, for herself and as next friend for her minor child, Angela Smyth; PATRICIA MONTGOMERY, for herself and as next friend for her minor child, Casey Montgomery,

Plaintiffs-Appellees,

v.

SONIA RIVERO, in her official capacity as Commissioner, Virginia Department of Social Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Harrisonburg.
James H. Michael, Senior District Judge.
(CA-96-89-5)

Argued: November 2, 2001

Decided: February 21, 2002

Before WILKINSON, Chief Judge, and WILLIAMS and MOTZ, Circuit Judges.

Reversed by published opinion. Judge Williams wrote the opinion, in which Chief Judge Wilkinson and Judge Motz joined.

COUNSEL

ARGUED: Maureen Riley Matsen, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Edward M. Wayland, Charlottesville, Virginia, for Appellees. **ON BRIEF**: Randolph A. Beales, Attorney General of Virginia, William H. Hurd, Solicitor General, Siran S. Faulders, Senior Assistant Attorney General, E. Paige Selden, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Steven L. Myers, VIRGINIA POVERTY LAW CENTER, INC., Richmond, Virginia, for Appellees.

OPINION

WILLIAMS, Circuit Judge:

Appellant Sonia Rivero, Commissioner of the Virginia Department of Social Services, appeals from a district court's order awarding attorney's fees to Appellees Victoria Smyth, Patricia Montgomery, and their children, Angela Smyth and Casey Montgomery (collectively, Smyth and Montgomery) under 42 U.S.C.A. § 1988(b) (West Supp. 2001), which authorizes an award of such fees to the prevailing party in an action to enforce the provisions of certain federal statutes. Because we conclude that the district court erroneously characterized Smyth and Montgomery as prevailing parties, we reverse.

I.

Seven recipients of aid[1] under the Aid to Families with Dependent Children (AFDC) program, a welfare program funded by the federal government and administered by the states, brought the underlying action under 42 U.S.C.A. § 1983 (West Supp. 2001) in the United States District Court for the Western District of Virginia, claiming that a new paternity identification policy for welfare applicants instituted by the Commissioner[2] violated the Social Security Act, 42 U.S.C.A. §§ 601 et seq. (West 1991 & Supp. 2001), and related federal regulations, as well as the Supremacy and Equal Protection Clauses of the U.S. Constitution. The policy, appearing at section 201.10 of Virginia's AFDC[3] Manual, required that an applicant for welfare in Virginia either identify the father of any child for whom aid was requested or, if uncertain of the child's paternity, provide the first and last names of all individuals who might be the father. The plaintiffs asserted that they were unable to identify the fathers of their children[4] as required by the

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[1]The plaintiffs below, three single mothers and their four children, sought and received permission to file their complaint and proceed in the action under pseudonyms. (J.A. at 3.) The pseudonyms were as follows: Victoria Smyth, Angela Smyth, Patricia Montgomery, Casey Montgomery, Lynn Winchester, C. Winchester, and K. Winchester.

[2]Smyth and Montgomery named Clarence H. Carter, Rivero's predecessor as Commissioner of the Virginia Department of Social Services, as the defendant in their complaint. On appeal, Rivero has been substituted for Carter. We shall refer to both as "the Commissioner" and for clarity shall use the feminine pronoun throughout this opinion when referring to the Commissioner.

[3]During the litigation below, the federal AFDC program was replaced, pursuant to federal law, by the Temporary Assistance for Needy Families (TANF) program. Pub. L. 104-193, Title I, § 103(a)(1), Aug. 22, 1996, 110 Stat. 2112. The program will be referred to hereinafter as TANF.

[4]Smyth stated that she could not identify any of several men who might be the father of her child to Virginia DSS officials. Montgomery provided Virginia DSS officials with the names of two possible fathers, but both men were proven not to be the father of her child by subsequent blood tests. Montgomery could provide only the first name of one other

policy, that they had communicated that fact to Virginia welfare officials, and that their welfare benefits had been reduced or eliminated altogether as a result. They sought, inter alia: (1) certification of a class of all children and their mothers who had been or would be subjected to the loss of cash assistance or other benefits for failure to comply with this regulation; (2) temporary restraining orders prohibiting the Commissioner from refusing to provide benefits to Smyth and Montgomery; (3) a declaratory judgment that the application of the policy to them violated the Social Security Act, related federal regulations, and the Supremacy and Equal Protection Clauses; (4) preliminary and permanent injunctions prohibiting the application of the policy to them or members of the proposed class and requiring instead that the Commissioner give an applicant the opportunity to attest under penalty of perjury to her lack of any requested information concerning her child's father, and further prohibiting the reduction or denial of benefits to an applicant so attesting unless the Commissioner had substantial evidence the attestation was false; and (5) attorney's fees and costs under § 1988.

In June 1996, the district court denied the plaintiffs' motion for class certification but entered a preliminary injunction barring enforcement of the paternity identification policy against the plaintiffs. In granting the preliminary injunction, the district court found that the balancing of likely harms in considering the plaintiffs' motion for a preliminary injunction clearly favored the plaintiffs, that the denial of benefits for noncooperation because of a claimant's inability to identify the father of her children contradicted the plain language of then-applicable federal regulations, and that the plaintiffs were thus likely to succeed on the merits.[5]

---

man whom she asserted might be the father of her children, and thus he could not be identified.

[5]Specifically, the district court noted that a federal regulation in force at the time, 45 C.F.R. § 232.12(b) (1995), defined the cooperation in establishing paternity required by 42 U.S.C.A. § 602(a)(26)(B) (West

The preliminary injunction entered by the court prohibited the Commissioner from denying welfare benefits to the plaintiffs "based solely on their inability to provide [the Commissioner] with paternity information after they have attested to a lack of information." (J.A. at 62.) Three of the seven plaintiffs (Lynn Winchester and her two children) were granted leave to dismiss their claims and did so at that point.

On August 1, 1996, Smyth and Montgomery moved for summary judgment, asserting that the language of 45 C.F.R. § 232.12(b) (1995) could not be reconciled with the Commissioner's paternity identification policy, that the policy was therefore invalid under federal law, and that they were entitled to a declaration to that effect and an injunction permanently enjoining the Commissioner from denying welfare benefits to otherwise eligible applicants in the same situation.

Thereafter, the Commissioner obtained a waiver from the Department of Health and Human Services (HHS) authorizing the definition of noncooperation in paternity identification implemented by the policy.[6] The waiver was conditioned on Virginia's establishing criteria for finding cooperation in those instances where it determines that the applicant cannot reasonably be expected to know the identifying information related to the child's father. Smyth

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1991) to include providing information "known to, possessed by, or reasonably obtainable by the applicant or recipient" and "providing information, or attesting to the lack of information, under penalty of perjury." The court stated that it agreed with Smyth and Montgomery that this regulation "operate[d] to preclude states from disregarding an attestation to lack of information by [a TANF] recipient or applicant." (J.A. at 60.) Section 232.12 has since been repealed.

[6]The waiver the Commissioner received from HHS is not included in the record on appeal. Because the parties agree that it was issued and as to its scope, however, we will assume its existence for purposes of this opinion.

and Montgomery then filed, on April 1, 1997, a supplemental memorandum in support of their motion for summary judgment in which they reiterated the claim that the Commissioner's policy violated the Equal Protection Clause of the Fourteenth Amendment and also claimed that the policy had conflicted with federal regulations until the waiver was implemented by the Commissioner in February 1997.

In her response to Smyth and Montgomery's motion for summary judgment and supplemental memorandum, the Commissioner stated that she would not seek repayment of benefits paid to Smyth and Montgomery prior to February 1, 1997, the date prior to which Smyth and Montgomery assert the Commissioner's policy conflicted with federal regulations. On September 11, 1997, the day before the scheduled hearing on Smyth and Montgomery's summary judgment motion, the parties' counsel agreed during a telephone conversation that Smyth and Montgomery would consent to continue the date of the hearing pursuant to a motion by the Commissioner and that the Commissioner would not seek repayment of benefits paid to Smyth and Montgomery between February 1, 1997 and the new date of the hearing. An understanding of this agreement (the September 11 agreement or the agreement) is contained in letters exchanged by counsel shortly after their conversation. The district court granted the unopposed motion to continue the hearing.

As of August 1, 1998, the Commissioner modified the paternity identification policy so that it no longer applies with respect to children born before May 1996 (the date of the original policy modification), provided that the welfare recipient declares under oath that she does not know the identity of the father of her child. The August 1998 modification, in other words, made the 1996 identification policy modification prospectively applicable only. As to children born after May 1996, the policy challenged by

Smyth and Montgomery remains unaltered. Because both children still involved in the litigation at the time of the 1998 modification (Angela Smyth and Casey Montgomery) were born before May 1996, the district court dismissed Smyth and Montgomery's claims as moot under the modified policy. The district court also found in its order of February 4, 2000 that the communications between the parties regarding continuance of the scheduled hearing on the Commissioner's summary judgment motion constituted an "agreement" that the Commissioner would not seek repayment of benefits paid to the plaintiffs between February 1, 1997 and the new date of that hearing. The district court based this finding in large part on counsel for the Commissioner's statements during a status conference held before the district court on April 15, 1999. During that conference, the court found, counsel for the Commissioner "was not troubled by the admission that the parties previously reached an agreement, but was concerned with the court ordering the parties not to seek such benefits." (J.A. at 327.) "Accordingly," the court wrote, "the dismissal order will declare that the defendant is unable to seek repayment of TANF benefits because of the binding agreement between the parties." (J.A. at 328.)

On March 6, 2000, the plaintiffs filed a motion for attorney's fees and costs, seeking a total of $195,074.54, which was granted in full by the district court on October 17, 2000. In its order granting the motion, the district court reiterated its finding that the parties had come to an "agreement" wherein the Commissioner waived her right to seek repayment of certain benefits from the plaintiffs in return for the plaintiffs' agreement not to contest continuance of the hearing on the Commissioner's motion for summary judgment. The district court then found that because the plaintiffs had received a "judgment against the defendant (the preliminary injunction)" and a "partial settlement, which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefitted the plaintiff," (J.A. at 495-96), the plaintiffs had

"prevailed" for purposes of § 1988(b), and were entitled to attorney's fees. The district court awarded Smyth and Montgomery attorney's fees in the amount of $195,074.54. The Commissioner timely noted this appeal from the order awarding fees.

While this case was pending on appeal, the Supreme Court granted certiorari in *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835 (2001). This Court granted the Commissioner's subsequent motion to hold this case in abeyance pending the Supreme Court's ruling. *Buckhannon* has now been decided and we have had the benefit of oral argument in this case.

II.

The Commissioner argues that the district court erred in finding that Appellees were prevailing parties in the action below and awarding Smyth and Montgomery attorney's fees pursuant to 42 U.S.C.A. § 1988 (West Supp. 2001). Ordinarily, we review an award of attorney's fees for abuse of discretion. *See Pierce v. Underwood*, 487 U.S. 552, 557-63, (1988); *Reich v. Walter W. King Plumbing & Heating, Inc.*, 98 F.3d 147, 151 (4th Cir. 1996); 42 U.S.C.A. § 1988 (stating that "the court, *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee") (emphasis added). The designation of a party as a prevailing party, however, is a legal determination which we review de novo. *See Perry v. Bartlett*, 231 F.3d 155, 163 (4th Cir. 2000).[7]

A.

[7]Because our resolution of the prevailing party issue is dispositive, we do not reach the Commissioner's argument that the district court abused its discretion in determining the amount of the attorney's fees award.

Under the "American rule" ordinarily applicable in our legal system, there is "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 1839 (2001). Congress has created such statutory authority in § 1988(b), which reads in pertinent part as follows:

> In any action or proceeding to enforce a provision of section[ ] . . . 1983 [among other provisions], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

42 U.S.C.A. § 1988(b). The term "prevailing party," as used in § 1988(b) and other fee-shifting provisions, is a "legal term of art," *Buckhannon*, 121 S. Ct. at 1839, and is "interpreted . . . consistently" -- that is, without distinctions based on the particular statutory context in which it appears. *Id.* at 1839 n.4.

Smyth and Montgomery urge us to find that the district court properly characterized them as prevailing parties on either of two theories. Either the preliminary injunction they were awarded by the district court or the September 11 agreement, they argue, effected the "'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 1840 (quoting *Texas State Teachers Assn. v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 792-93, (1989)). The preliminary injunction entered by the district court is sufficient, they assert, to constitute an "enforceable judgment[] on the merits . . . ." *Id.* They contend that the Commissioner's modification of the TANF policy after entry of that injunction is equivalent to a recognition of and compliance with the injunction's terms, and that the injunction was thus sufficiently equivalent to a judgment on the merits to be characterized as having effected

a material alteration in their legal relationship to the Commissioner. Alternatively, Smyth and Montgomery argue, the district court's reference to the September 11 agreement in its order renders that agreement "judicially sanctioned," and permits an award of attorney's fees on that basis. *Id.* Specifically, they contend that the district court's finding that the parties entered into a "binding agreement" throws sufficient judicial weight behind the agreement's terms to meet the standard enunciated in *Buckhannon* and earlier cases.

B.

Because we have not previously considered *Buckhannon* in the context presented here, we pause to review briefly the factual and procedural circumstances of that case. *Buckhannon* involved a challenge to the closing of care homes (facilities that provide "assisted living" to their residents) that had failed an inspection by the West Virginia State Fire Marshal because, under state law, some of the homes' residents were incapable of "self-preservation" (defined essentially as the ability to escape a dangerous situation under one's own power). *Id.* at 1838. Buckhannon Board and Care Home, Inc., proprietor of the homes, instituted an action seeking declaratory and injunctive relief on the ground that the self-preservation requirement violated federal law, specifically the Fair Housing Amendments Act of 1988, 42 U.S.C.A. §§ 3601 et seq. The West Virginia Department of Health and Human Resources "agreed to stay enforcement of the cease and desist orders pending resolution of the case . . . ." *Id.* Before the case was resolved on the merits, West Virginia eliminated the self-preservation requirement, and the case was dismissed as moot. *Id.* Buckhannon moved for costs and attorney's fees, which were denied at the trial level and by this Circuit on appeal.

The Supreme Court affirmed, holding that the circumstances of the case could not support a finding that Buckhannon was a prevailing party for purposes of awarding attorney's fees. *Id.* at 1840. The Supreme Court specifically rejected the "catalyst theory," concluding that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" to make that plaintiff a prevailing party. *Id.*

The *Buckhannon* Court considered the character of the judicial relief that a party must receive to satisfy the prevailing party standard, finding the catalyst theory problematic in part because "[e]ven under a limited form of the 'catalyst theory,' a plaintiff could recover attorney's fees if it established that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.'" *Id.* (quoting Brief for United States as Amicus Curiae). Such preliminary successes, the Court stated, are "not the type of legal merit that our prior decisions, based upon plain language and Congressional intent, have found necessary." *Id.* In support of this proposition, the Court pointed to its decision in *Hewitt v. Helms*, 482 U.S. 755 (1987), where it held that "an interlocutory ruling that reverses a dismissal for failure to state a claim 'is not the stuff of which legal victories are made.'" *Buckhannon*, 121 S. Ct. at 1840 (citing *Hewitt*, 482 U.S. at 760).

C.

A preliminary injunction such as that granted to Smyth and Montgomery below is closely analogous, for these purposes, to the examples of judicial relief deemed insufficient in *Buckhannon*. While granting such an injunction does involve an inquiry into the merits of a party's claim, see *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (enunciating the

test for granting a preliminary injunction, which includes an examination of the likelihood the plaintiff will succeed on the merits), and is, like any court order, "enforceable," the merits inquiry in the preliminary injunction context is necessarily abbreviated. Our precedent establishes that a plaintiff may, depending on the circumstances, need only to establish that his case presents a "substantial question" to obtain preliminary injunctive relief. *Safety-Kleen, Inc. (Pinewood) v. Wyche*, No. 00-2170, slip op. at 19, __ F.3d __ (4th Cir. Dec. 19, 2001) ("'If the harm balance tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation. . . .' In other words, the plaintiff's case must at bottom present a 'substantial question'") (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)); *MicroStrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (same; noting also that "if the plight of the defendant [is] not substantially different from that of the plaintiffs, that is, if there is no imbalance of hardship in favor of the plaintiff, then the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success") (alteration in original) (internal quotation marks omitted).

At the most, a party seeking a preliminary injunction may have to demonstrate "a 'strong showing of likelihood of success' or a 'substantial likelihood of success' by 'clear and convincing evidence' in order to obtain relief." *MicroStrategy*, 245 F.3d at 340. A district court's determination that such a showing has been made is best understood as a prediction of a probable, but necessarily uncertain, outcome. *Cf.* 11A Charles Alan Wright et al., *Fed. Prac. & Proc.: Civil 2d* § 2948.3 at 188 (West 1995) (stating that "[a]ll courts agree that plaintiff must present a prima facie case but need not show that he is certain to win"). The

fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the "deliberate investigation" that follows the granting of the preliminary injunction.

Moreover, in granting a preliminary injunction a court is guided not only by its assessment of the likely success of the plaintiff's claims, but also by other considerations, notably a balancing of likely harms. *Safety-Kleen*, No. 00-2170, slip op. at 19 (explaining that "'the likelihood of irreparable harm to the plaintiff' is the first factor that a court should consider . . . [and the] next step is to balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant"; only then should the likelihood of success on the merits be considered) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). *But cf., e.g., United States v. Kayser Roth Corp.*, 272 F.3d 89, 101 n.14 (1st Cir. 2001) (stating that the "[l]ikelihood of success is the touchstone of the preliminary injunction inquiry") (alteration in original) (internal quotation marks omitted). In weighing these factors, a court should bear in mind that the factors "must work in conjunction," *Ciena Corp. v. Jarrard*, 203 F.3d 312, 323 (4th Cir. 2000), and a high likelihood of harm to the plaintiff may reduce the extent to which that plaintiff must demonstrate a likelihood of success on the merits. *Id.* (stating that "[i]f the 'hardship balance tilts sharply and clearly in the plaintiff's favor, the required proof of likelihood of success is substantially reduced.'") (quoting *Direx*, 952 F.2d at 817); *cf. Steakhouse, Inc. v. Raleigh*, 166 F.3d 634, 637 (4th Cir. 1999) (stating that "[t]he more the balance of harms leans away from the plaintiff, the stronger his showing on the merits must be"). A plaintiff's burden to show a likelihood of success on the merits, in other words, varies according to the harm the plaintiff would be likely to suffer absent an injunction. While this framework may be well suited to reconciling the practical, equitable, and legal

concerns that face a court determining whether to grant a party interim relief, *cf. Ciena*, 203 F.3d at 323 (identifying the *Blackwelder* factors as leading to an "overall equitable determination"), it renders such relief an unhelpful guide to the legal determination of whether a party has prevailed.[8]

The proceedings below in this case present an example of the preliminary, incomplete nature of the merits examination and the interplay between the "likely harms" and "likelihood of success" factors in the preliminary injunction inquiry. Applying the *Blackwelder* test, the district court found that the balancing of likely harms strongly favored Smyth and Montgomery because the loss of benefits would be a severe hardship for them. The district court's decision to enter an injunction reflected that finding, as well as an assessment of the likelihood of success of Smyth and Montgomery's claims. The interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an "enforceable judgment[] on the merits" or something akin to one for prevailing party purposes. *Buckhannon*, 121 S. Ct. at 1840. For the reasons given above, we hold that the preliminary injunction entered

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[8]Our Circuit's current framework for the preliminary injunction inquiry, specifically the establishment of the "analytical order, hierarchy of importance, . . . comparative weights," and the intertwining of consideration of the factors in our prior cases has been criticized as a departure (in form if not necessarily in practice) from Supreme Court precedent. *Safety-Kleen, Inc.*, No. 00-2170, slip op. at 33-38 (Luttig, J., concurring). Whatever the merits of this argument, it does not alter our conclusion here. The preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated.

by the district court does not satisfy the prevailing party standard of § 1988(b).[9]

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[9]Smyth and Montgomery contend that some preliminary injunctions are sufficiently based on the merits to serve as a basis for an award of attorney's fees to the recipient as a prevailing party. They would distinguish such injunctions from those such as the injunction entered in *Smith v. Univ. of North Carolina*, 632 F.2d 316 (4th Cir. 1980), which they argue did not address the merits, but was entered "merely to maintain the status quo." *Id.* at 347. They contend the district court did examine the merits of their case and reached a result favorable to them, and their injunction is thus materially different from Smith's.

Addressing a preliminary injunction entered in a Title VII action, this Court found in *Smith* that the grant of the injunction to the plaintiff did not render her a prevailing party for purposes of awarding attorney's fees. There had not been, we reasoned, "a final disposition in favor of the party claiming it had prevailed." *Id.* at 349. *Smith* did not, however, render preliminary injunctions categorically deficient for prevailing party purposes. Rather, *Smith* only held that the plaintiff is not a prevailing party where the plaintiff obtains a preliminary injunction but ultimately fails to achieve the desired result. *See id.* at 346 (noting that "on none of her claims has [the plaintiff] ultimately obtained what she sought"); *id.* at 352 (stating that "just because an injunction was issued properly does not signify that a defendant must incur the costs of its issuance when a court has eventually proclaimed him to be innocent of discriminatory conduct"); *see also Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 885 (4th Cir. 1982) (stating that *Smith* "held only that a party was not entitled to attorney's fees in connection with her successful application for a preliminary injunction, since the trial court ultimately ruled for her adversary on the merits").

The conclusion that *Smith* does not in all cases preclude prevailing party status on the basis of a preliminary injunction, however, is not support for the inverse of that conclusion -- that a preliminary injunction is in some cases a proper basis for prevailing party status. Moreover, the *Smith* court did consider the characteristics of a preliminary injunction that we believe make such an injunction an improper basis for the conclusion that a party has prevailed. *See Smith*, 632 F.2d at 347 (noting that the preliminary injunction hearing involved, at the most, "a prognosis of probable or possible success" and that the balancing of likely harms had favored Smith at the preliminary injunction stage). Whatever its scope, then, *Smith* does not support Smyth and Montgomery's position, and it is consistent with our holding here.

D.

Smyth and Montgomery next argue that they may be considered prevailing parties under the Supreme Court's reasoning in *Buckhannon* regarding consent decrees by virtue of the September 11 agreement, which they assert was incorporated in the district court's order and thus stamped with judicial imprimatur. *See id.* (stating that "court-ordered consent decrees" may meet the prevailing party standard). The agreement, they argue, gave them some of the relief they sought in bringing this action and was approved by the district court, rendering it equivalent, or at least analogous, to a consent decree.

We note initially that neither of the Commissioner's two waivers of the right to seek recoupment of benefits paid to Smyth and Montgomery is easily construed as a settlement. The initial waiver, made in her response to Smyth and Montgomery's motion for summary judgment, was entirely unilateral and thus cannot be so construed. The Commissioner stated therein that she would not seek repayment of benefits paid to Smyth and Montgomery prior to February 1, 1997. No evidence suggests that this waiver was anything but a voluntary gesture by the Commissioner. Indeed, Smyth and Montgomery might nearly as credibly suggest that the Commissioner's voluntary change to the paternity identification policy represented a "settlement" of their claims, as the actions were equally unilateral. *Buckhannon* teaches that such a voluntary, unilateral act is not enough for the opposing party to be said to have prevailed. *Buckhannon*, 121 S. Ct. at 1840 ("[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change").

Nor is the September 11 agreement, in which the Commissioner again waived the right to seek recoupment of

benefits, easily construed as a settlement. The Commissioner, through counsel, agreed therein not to seek repayment of benefits paid to Smyth and Montgomery between February 1, 1997 and the rescheduled hearing date for the summary judgment motion; that is, she agreed to extend her previously executed unilateral waiver. This agreement was more in the nature of a procedural quid pro quo than a settlement of any of Smyth and Montgomery's claims. The Commissioner agreed merely to maintain the status quo (that is, payment of benefits to Smyth and Montgomery without the threat of subsequent action to recover those benefits) in return for an uncontested continuance of the hearing date.

Even if the September 11 agreement were properly characterized as a partial settlement, however, Smyth and Montgomery would have to contend with the *Buckhannon* Court's disapproval of private settlements as a basis for prevailing party status. Although the Supreme Court suggested in *Maher v. Gagne*, 448 U.S. 122, 129, (1980), that a party may prevail for purposes of § 1988 by virtue of a private settlement and has repeated that suggestion elsewhere, *see, e.g., Farrar v. Hobby*, 506 U.S. 103, 111, (1992) (characterizing *Maher* as allowing attorney's fees award for private settlement); *see also S-1 & S-2 ex rel. P-1 & P-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) (stating that "an enforceable judgment, consent decree, or *settlement* giving some of the relief sought" is necessary for prevailing party status) (emphasis added), the *Buckhannon* Court has since clarified the law on this point. In *Buckhannon*, the Court stated that its prior "dicta" suggesting that private settlements could support prevailing party status had "ignore[d] that *Maher* only 'held that fees *may* be assessed . . . after a case has been settled by the entry of a consent decree.'" *Buckhannon*, 121 S. Ct. at 1840 n.7 (quoting *Evans v. Jeff D.*, 475 U.S. 717, 720, (1986) (emphasis and second alteration in original)). The Court then distinguished private settlements from consent

decrees on the basis of the court's role in the disposition of the case. "Private settlements," the Court noted, "do not entail the judicial approval and oversight involved in consent decrees." *Id.* The Court further noted that "federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Id.*

Smyth and Montgomery do not argue that the district court's order dismissing this case as moot was a consent decree. They do argue, however, that the September 11 agreement "was judicially sanctioned and incorporated into the court's final judgment" (Br. of Appellants at 10) by virtue of that order -- in other words, that the order was equivalent to a consent decree for the purposes of determining whether they were prevailing parties. In some instances, they argue, outcomes not expressly characterized as consent decrees will nevertheless entail the judicial approval and oversight involved in consent decrees. The resolution of this case, they contend, presents such a situation. For the reasons set out below, we conclude that the precondition to such a finding -- that the terms of the agreement be made part of the district court's order -- does not exist, and therefore we reject this argument without determining whether the district court's order would render them prevailing parties had the terms agreed to by the parties been made a part of it.

Before turning to the question of whether the September 11 agreement and the district court's order below were, in combination, equivalent to a consent decree, it is helpful briefly to examine the relevant differences between settlements and consent decrees generally, as we conclude that these differences must inform the Supreme Court's determination that a line should be drawn between them in the prevailing party context. A consent decree has elements of both judgment and contract, a dual character that "result[s] in different treatment for different purposes." *Local No. 93, Int'l Assn. of Firefighters, AFL-CIO v. Cleveland*, 478 U.S.

501, 519, (1986) (describing the "hybrid nature" of consent decrees); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n.10, (1975) (stating that "[c]onsent decrees and orders have attributes both of contracts and of judicial decrees") (citing *United States v. Swift & Co.*, 286 U.S. 106, (1932)). Thus, a consent decree

> embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 378, (1992) (citing *Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 650-51, (1961)); *see also Alexander v. Britt*, 89 F.3d 194, 199 (4th Cir. 1996).

The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order. *See, e.g., United States v. Miami*, 664 F.2d 435, 439-40 (5th Cir. 1981) (en banc) (concurring opinion of Rubin, J., joined by Brown, Anderson, Randall, and Thomas A. Clark, JJ.) ("A consent decree, although founded on the agreement of the parties, is a judgment. It has the force of res judicata, protecting the parties from future litigation. As a judgment, it may be enforced by judicial sanctions, including citation for contempt if it is violated."). Because it is entered as an order of the court, the terms of a consent decree must also be examined by the court. As Judge Rubin noted in *United States v. Miami*,

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its

> terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.

664 F.2d at 441 (Rubin, J., concurring). In other words, a court entering a consent decree must examine its terms to ensure they are fair and not unlawful.

By contrast, a private settlement, although it may resolve a dispute before a court, ordinarily does not receive the approval of the court. *Cf., e.g., Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995) ("Our federal courts have neither the authority nor the resources to review and approve the settlement of every case brought in the federal court system. There are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval."). Nor is a private settlement agreement enforceable by a district court as an order of the court unless the obligation to comply with its terms is "made part of the order of dismissal -- either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, (1994). If the obligation to comply with the terms of the agreement is not made part of an order of the court, jurisdiction to enforce the settlement agreement will not exist absent some independent basis of jurisdiction. *Id.*

These characteristic features of consent decrees and private settlements are significant in the prevailing party context. A consent decree, because it is entered as an order of the court, receives court approval and is subject to the

oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements. The Supreme Court's admonition that consent decrees may satisfy the prevailing party standard while private settlements ought not be so construed is thus consistent with the general purposes and effects of the two forms of resolution of disputes. Generally, the Supreme Court has stated, a determination of "legal merit" is necessary for an award of attorney's fees. *Buckhannon*, 121 S. Ct. at 1840, 1841 (stating that prior Supreme Court cases establish a "'merit' requirement"). A consent decree, because of its "hybrid nature," is a special case; although it is a privately negotiated form of relief and "does not always include an admission of liability by the defendant," *id.*, it nevertheless involves judicial approval and oversight that may suffice to demonstrate the requisite "court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant." *Buckhannon*, 121 S. Ct. 1840 (alteration in original) (internal quotation marks omitted).[10]

Although the district court's order below did not describe its disposition of the case as a "consent decree" (or a "consent order" or "consent judgment"), that does not necessarily end the inquiry. We doubt that the Supreme

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[10]We recognize that this Circuit has in the past upheld awards of attorney's fees based on private settlements not integrated into consent decrees or court orders. *See, e.g., Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 885-86 (4th Cir. 1982) (upholding determination that plaintiffs who settled and dismissed discrimination action were prevailing parties); *Young v. Kenley*, 641 F.2d 192, 195 (4th Cir. 1981) (same). These decisions, however, even if they survived our rejection of the catalyst theory in *S-1 & S-2 ex rel. P-1 & P-2 v. State Bd. of Ed. of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc) (adopting dissenting opinion of Wilkinson, J., 6 F.3d 160, 168-72) (rejecting catalyzation of post-litigation changes in a defendant's conduct as a basis for prevailing party status), do not survive *Buckhannon's* rejection of private settlements as a basis for prevailing party status, *Buckhannon*, 121 S. Ct. at 1840. *Buckhannon's* reasoning indicates that without a "judicially sanctioned change in the legal relationship of the parties," a party has not prevailed. *Id.*

Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words "consent decree" be used explicitly. Where a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court's approval and the attendant judicial oversight (in the form of continuing jurisdiction to enforce the agreement) may be equally apparent. We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such. See *Buckhannon*, 121 S. Ct. at 1840 (identifying the "judicial approval and oversight involved in consent decrees" as distinguishing them from private settlements).[11]

We turn, therefore, to the question of whether the terms of the September 11 agreement were in fact made an enforceable part of the district court's order, as those of a consent decree would be. The issue of when the obligation to comply with the terms of a settlement agreement has been

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[11]Although a district court's incorporation of an agreement's terms or retention of jurisdiction in its order may demonstrate the degree of approval and oversight identified by the Supreme Court in *Buckhannon* as accompanying consent decrees, approval and oversight of an agreement alone will not suffice to make a party a prevailing party. The party must likewise demonstrate that it has received some of the relief it sought in bringing the lawsuit in the first place. *See, e.g., Maher v. Gagne*, 448 U.S. 122, 126 (upholding award of attorney's fees where consent decree increased level, for purposes of AFDC benefits calculation, of workrelated expenses deductible from income and gave AFDC recipients right to prove that actual expenses exceeded standard deduction where plaintiff had claimed that state regulations denied her credit for work-related expenses in violation of federal law). An agreement that the plaintiff will join a motion to dismiss a lawsuit in return for the defendant's promise not to seek sanctions against the plaintiff, for instance, would not render the plaintiff a prevailing party even if incorporated into an enforceable court order. Because we find the "settlement" achieved by Smyth and Montgomery insufficient to support prevailing party status, we do not discuss the nature of the "relief" they achieved thereby.

made part of an order of the court was examined by the Supreme Court in *Kokkonen*. Addressing a question of the scope of ancillary jurisdiction, the Supreme Court held that neither of the traditional "heads" of ancillary jurisdiction -- to permit disposition by a single court of factually interdependent claims, and to enable a court to manage its proceedings, vindicate its authority, and protect its decrees -- could support an assertion of jurisdiction to enforce a settlement agreement entered into by the parties and resulting in dismissal of the case pursuant to a stipulation by the parties. *Kokkonen*, 511 U.S. at 379-81. The second "head" of ancillary jurisdiction, the Court reasoned, could not support the assertion because a court's need to protect its orders does not entail the power to enforce an agreement that was not made part of a court order in the first place. *Id.* The situation would have been different, the Court noted, if the obligation to comply with the terms of the settlement had been made part of the order; in that case, a breach of the agreement would also be a breach of the order, and the court could properly exercise its power to enforce the order. *Id.* at 381. We find *Kokkonen's* reasoning instructive here. A court's responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur, and the continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement. Where the obligation to comply with the terms of the agreement is not enforceable as an order of the court but only as a contractual obligation, neither judicial approval nor oversight are ordinarily involved.[12]

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[12]Some courts have suggested or identified circumstances where a district court might "approve" a settlement without making an obligation to comply with its terms part of its order dismissing the case. *See, e.g., Kokkonen*, 511 U.S. at 381 ("judge's mere awareness and approval of the settlement agreement do not suffice to make them part of his order"); *In re Phar-Mor Securities Litigation*, 172 F.3d 270, 274-75 (3d Cir. 1999) (holding that although district court approved terms of settlement, it did not incorporate the terms of the settlement or retain jurisdiction over it, and therefore there was no jurisdiction to enforce it); *Miener*, 62 F.3d at

The obligation to comply with a settlement's terms must be expressly made part of a court's order for jurisdiction to enforce the settlement after dismissal of the action to exist. *See Kokkonen*, 511 U.S. at 381 ("The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order."). Either incorporation of the terms of the agreement or a separate provision retaining jurisdiction over the agreement will suffice for this purpose. *Id.* Where a court merely recognizes the fact of the parties' agreement and dismisses the case because there is no longer a dispute before it, the terms of the agreement are not made part of the order and consequently will not serve as a basis of jurisdiction.

The rule that a court's order must embody a settlement agreement to serve as a basis of jurisdiction to enforce the agreement is "adhered [to] strictly . . . ." *In re Phar-Mor, Inc. Securities Litigation*, 172 F.3d 270, 274 (3d Cir. 1999). This rule is interpreted to require that the district court give a clear indication that it is incorporating the terms of the agreement into that order or retaining jurisdiction over the agreement. *See, e.g., In re Bond*, 254 F.3d 669, 675-76 & n.4 (7th Cir. 2001) (stating that *Kokkonen* appeared to require "express" incorporation or retention; holding that district court's acting as if it had retained jurisdiction did not satisfy even the more lenient standard established in Seventh Circuit before *Kokkonen* and therefore declining to resolve whether *Kokkonen* modified that standard); *In re PharMor*, 172 F.3d at 274 (holding that district court's dismissal "pursuant to the

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1127 (same). Although no "approval" by the court of the agreement reached between the parties is apparent here, we note that even such approval by the court of a settlement agreement would not create, as these cases demonstrate, judicial "oversight" of that agreement resulting from continuing jurisdiction over it, one of several factors that set consent decrees apart from private settlements. *Buckhannon*, 121 S. Ct. at 1840 n.7.

terms of the settlement agreement" did not incorporate the terms of the settlement or retain jurisdiction); *Scelsa v. City Univ. of N.Y.*, 76 F.3d 37, 41 (2d Cir. 1996) (stating that district court has jurisdiction only if the dismissal order expressly reserved authority to enforce the agreement, or incorporated the agreement into the order; holding, where dismissal order stated that "action is dismissed with prejudice and without costs to any party, except as set forth in the Settlement Agreement," jurisdiction to enforce did not exist under *Kokkonen*); *Miener v. Missouri Dep't of Mental Health*, 62 F.3d 1126, 1127-28 (8th Cir. 1995) (holding, where dismissal order at issue acknowledged that "all matters . . . have been settled and resolved" but did not mention the settlement agreement itself or its terms, that district court did not have jurisdiction to enforce the order); *Hagestad v. Tragesser*, 49 F.3d 1430, 1432-33 (9th Cir. 1995) (holding that dismissal order stating "action has been settled" did not incorporate the settlement agreement); *Lucille v. City of Chicago*, 31 F.3d 546, 548-49 (7th Cir. 1994) (determining that a judgment "entered in accordance with" a settlement agreement did not incorporate settlement); *cf. Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir.), *cert. denied*, 531 U.S. 918, (2000) (holding that an agreed-to provision stating that "[t]he Court retains jurisdiction to enforce the settlement of the parties and the prior Orders in this case" satisfied *Kokkonen's* requirement that a court either retain jurisdiction or incorporate the terms of the settlement agreement into its order); *Bell v. Schexnayder*, 36 F.3d 447, 448 (5th Cir. 1994) (holding that the district court retained jurisdiction by including language in its dismissal order that gave the parties the right to reopen the judgment if a settlement was not consummated within sixty days).

We have no trouble concluding that the district court's order in this case does not meet the test enunciated in *Kokkonen*. The district court's mention of the September 11 agreement in its final order, although it states that the

Commissioner is unable to seek repayment of TANF benefits because of the binding agreement between the parties, does not make the obligation to comply with the terms of that agreement part of the order. First, nothing in the court's order could be construed as a retention of jurisdiction to enforce the agreement. Moreover, no language in the court's order clearly compels compliance with the terms agreed to by the parties. The district court's order in this case consists of two parts. In the first part, the court made two findings -- that the Commissioner had revised the policy at issue so that Smyth and Montgomery were no longer disqualified from receiving benefits, and that the Commissioner could not seek repayment of TANF benefits paid to the plaintiffs under the prior policy. The second of these findings was stated as follows: "The court further *finds* that the defendant may not seek repayment of TANF benefits paid to the plaintiffs under the policy." (J.A. at 321) (emphasis added). The court went on to note the agreement of the parties as the source of this obligation, stating that the obligation existed because, "[b]y agreement of the parties . . . the [Commissioner] extended th[e] waiver" of the right to seek repayment of benefits from Smyth and Montgomery. *Id.* The second part of the court's order comes under the heading "ADJUDGED AND ORDERED," and contains statements that the case is moot for prudential reasons and the court lacks jurisdiction, that the Commissioner's motion to dismiss the case is granted, and that the court reserves jurisdiction to decide the issue of attorney's fees. (J.A. at 322.)

Nothing in this order suggests that the terms of the parties' agreement are "incorporated" into the order by a clear indication that they must be complied with pursuant to the order itself, as opposed to the principles of contractual obligation. The court's findings are most properly read as noting and reciting the agreement in question as a component of its analysis of the mootness of the case after the Commissioner's modification of the policy, rather than incorporating the agreement's terms. Examination of the

Memorandum Opinion accompanying the order supports this conclusion. The district court noted in its Memorandum Opinion that the Commissioner had expressed concern shortly before entry of the final order with the court's "ordering the [Commissioner] not to seek . . . benefits." (J.A. at 327.) When "asked whether there was anything wrong with reciting" the fact of the agreement and its effect in the order, however, the Commissioner stated that there was not. *Id.* The court's finding in the order that the Commissioner may not seek repayment of TANF benefits is therefore properly interpreted as a "recit[ation]" of the agreement rather than an approval and incorporation the agreement's terms. *Cf. Kokkonen*, 511 U.S. at 381 (noting that the agreement reached by the parties there was "recited, on the record, before the District Judge").[13]

The district court also stated in its Memorandum Opinion that "the defendant is unable to seek repayment of TANF benefits *because of the binding agreement between the parties*" (J.A. at 328). It is thus apparent that the district court itself, plainly best situated to define the intent of its order, believed that the obligation to comply with the terms of the agreement stemmed from the agreement rather than its order.

We conclude that the judicial approval and oversight identified by the Supreme Court as involved in consent decrees are lacking where, as here, a settlement agreement (if the September 11 agreement can be categorized as such) is

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[13]We note that if the district court had incorporated the obligation to comply with the September 11 agreement in its order, the colloquy described here would raise a serious question as to whether both parties consented to incorporation of that agreement into a court order. *Cf. Local No. 93, Int'l Assn. of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 522, (1986) (citing *United States v. Ward Baking Co.*, 376 U.S. 327, (1964), for the proposition that a court "cannot enter [a] consent decree to which one party has not consented"). We need not address this issue, however, because we conclude that this settlement agreement was not incorporated into the district court's order.

neither incorporated explicitly in the terms of the district court's dismissal order nor the subject of a provision retaining jurisdiction. The September 11 agreement was not, in other words, made a part of a court order and accordingly cannot be equated with a consent decree. Smyth and Montgomery therefore cannot be said to have prevailed, and we need not inquire whether other aspects of this agreement might distinguish it from those consent decrees sufficient to support a finding that a party has prevailed. To hold that Smyth and Montgomery are entitled to attorney's fees in this situation would defeat the Supreme Court's admonition in *Buckhannon* that § 1988 does not "authorize [] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the sought-after destination without obtaining any judicial relief." *Buckhannon*, 121 S. Ct. at 1841 (internal quotation marks omitted).

III.

We conclude that the district court erred in characterizing Smyth and Montgomery as prevailing parties and granting them attorney's fees on that basis. The district court's order granting attorney's fees is accordingly reversed.

REVERSED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, for herself and as next friend for her minor child, Angela Smyth,	)	CIVIL ACTION NO. 5:96CV00089
and	)	
PATRICIA MONTGOMERY, for herself and as next friend for her minor child, Casey Montgomery,	)	
and	)	
LYNN WINCHESTER, for herself and as next friend for her minor children, C. Winchester and K. Winchester,	)	MEMORANDUM OPINION
Plaintiffs,	)	
v.	)	
CLARENCE H. CARTER, in his official capacity as Commissioner of the Virginia Department of Social Services, Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the plaintiffs' petition for approximately $200,000 in attorney's fees, costs, and expenses. Having fully considered the issues presented and the parties' arguments, the court shall grant the plaintiffs' petition.

I.

Plaintiffs Victoria Smyth and Patricia Montgomery were recipients of federal welfare block grant money known as Temporary Assistance to Needy Families ("TANF") (formerly Aid to Families with Dependant Children ("AFDC")), distributed by the Commonwealth of Virginia.[1] The defendant is the Commissioner of the Virginia Department of Social Services ("VDSS"), sued in his official capacity as administrator of Virginia's TANF program. The plaintiffs filed this action pursuant to 42 U.S.C. § 1983, challenging the Commonwealth's policy requiring mothers seeking welfare to identify the fathers of their children. The plaintiffs claimed that the policy violated the Social Security Act, the federal regulations promulgated thereunder, and the Supremacy and Equal Protection Clauses of the United States Constitution.

Under the paternity identification requirement, a mother applying for aid under the TANF program is required to identify the children's father. The plaintiffs claimed VDSS denied or reduced their benefits because the agency deemed them "noncooperative" based on their inability to provide the agency with the fathers' names. The plaintiffs alleged that their failure to provide VDSS with the required paternity information was justified because they do not know the identity of their children's father.

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[1]Plaintiff Lynn Winchester and her children, C. Winchester and K. Winchester, originally were parties to this suit, but subsequently were dismissed by stipulation. Counsel for the plaintiffs did not petition for fees related to the Winchesters' claims.

On May 30, 1996, the plaintiffs filed a motion for a preliminary injunction. In ruling on the motion, the court found, among other things, that VDSS's policy of denying benefits for noncooperation due to the claimant's inability to identify her children's father contradicted the plain language of the applicable federal regulations. *See Smyth v. Carter*, 168 F.R.D. 28 (W.D. Va. 1996). The court granted the motion on June 25, 1996. Due to the preliminary injunction, the plaintiffs continued to receive benefits from June 1996 to August 1998, while VDSS's original paternity identification policy was in effect.

On August 5, 1996, the Commonwealth received a waiver from the United States Department of Health and Human Services, which permitted the Commonwealth to have a more rigorous definition of "cooperation" than the federal law. Because of the waiver, the plaintiffs' federal statutory and regulatory arguments no longer were available to challenge the post-1996 policy. After the waiver was granted, the plaintiffs continued to challenge the policy on Equal Protection grounds, arguing that it was irrational and unfair to pay benefits to needy children who could identify their fathers, while denying benefits to needy illegitimate children who could not.

On April 1, 1997, the plaintiffs moved for summary judgment, challenging the entire policy on constitutional grounds, and the pre-1996 policy on statutory and regulatory grounds. The issues were briefed substantially by all parties. Oral argument on the motion was scheduled for September 12, 1997. The day before oral argument, the defendant requested a postponement to consider revising the policy in a way that would exempt the plaintiffs from its requirements. The plaintiffs agreed to postpone the hearing in exchange for the defendant's agreement not to seek repayment of benefits already paid to them, regardless of whether they prevailed on their claims. After considering additional briefing and argument, the court found this to be a binding agreement

between the parties. *See Smyth v. Carter*, 88 F. Supp. 2d 567, 570 (W.D. Va. 2000).

Effective August 1, 1998, the defendant amended the paternity identification policy, making its application prospective only. The policy now does not apply to children born before May 1, 1996, so long as the mother attests to her lack of information regarding paternity under penalty of perjury. Both of the children in this case were born prior to that date. Plaintiff Victoria Smyth subsequently left the TANF program, and on February 4, 2000, the court dismissed the case as moot for prudential reasons. *See id.* at 571.

The plaintiffs filed a "Petition for Attorneys' Fees, Costs, and Expenses" on March 6, 2000, requesting an award of $183,213.44. Adding 59.02 hours and some additional expenses incurred in preparing and arguing the petition, the plaintiffs increased the amount by $11,861.10, resulting in a total request of $195,074.54. The parties now dispute whether the plaintiffs can claim prevailing party status and be awarded these fees.

II.

The Civil Rights Attorney's Fees Awards Act provides, "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (West Supp. 2000) (footnote omitted). In deciding whether to grant the plaintiffs an award of attorney's fees, the court must determine, first, whether the plaintiffs are prevailing parties, and second, the reasonableness of the fee.

A.

The Supreme Court of the United States prescribed the standard for determining whether a party "prevails" for the purposes of § 1988, as follows:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. . . . [A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) (citations omitted); see also *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (*en banc*) (*per curiam*) (vacating *S-1 & S-2 v. State Bd. of Educ.*, 6 F.3d 160 (4th Cir. 1993), and adopting the dissenting panel opinion of Judge Wilkinson, reported at 6 F.3d at 168-72) (applying *Farrar*). "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, at 1 (1976)).

The plaintiffs assert they are prevailing parties because they obtained a settlement and a preliminary injunction, both of which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that provided the plaintiffs with most of the relief they sought. Specifically, the plaintiffs claim that the defendant modified his behavior not only by entering the settlement, which relieved the plaintiffs from having to repay benefits already received, but also by changing the paternity identification policy in a way that exempted the plaintiffs from its requirements. The defendant advances three arguments to support his position that the plaintiffs have not "prevailed"

under § 1988: (1) the court's mootness ruling precludes a finding that the plaintiffs have prevailed; (2) the preliminary injunction was insufficiently final to confer prevailing party status; and (3) there was no settlement between the parties.

1.

The defendant's principal argument is that the court's ruling that the case is moot for prudential reasons forecloses any finding that the plaintiffs have prevailed in this action by virtue of the defendant's changing the policy. The defendant relies on *S-1 & S-2, supra*. In that case, the plaintiffs were handicapped children enrolled in the Ashboro, North Carolina schools. Their parents requested that the schools either provide special education for the children, or reimburse the parents for private special education, in which the children already were enrolled part-time. When the School Board refused the parents' reimbursement claim, they sued, alleging that the Ashboro City Board of Education, the State Board of Education of North Carolina, and the chairman of the State Board violated their rights under 42 U.S.C. § 1983. The district court granted summary judgment in favor of the plaintiffs, the defendants appealed. While the appeal was pending, the plaintiffs reached a partial settlement of the case with the City Board, but the State defendants were not parties to the settlement agreement. The court of appeals subsequently found the case moot for prudential reasons, because the settlement gave the plaintiffs all the reimbursement they requested. Three years later, in response to pressure by the federal government, the State ultimately changed its policy. On remand, the district court awarded attorney's fees to the plaintiffs under § 1988. Sitting *en banc*, the Fourth Circuit reversed, holding that "the dismissal *on appeal* of an action under 42 U.S.C. § 1983 for prudential reasons as moot operates to vacate the judgment below and prevents the plaintiffs from being found prevailing parties by virtue of *post-dismissal* events." *S-1 & S-2*, 21 F.3d at 51 (emphasis added).

The defendant cites *S-1 & S-2* to support his position that the revision of the policy does not make the plaintiffs prevailing parties when the case has been dismissed as moot for prudential reasons. The court finds that *S-1 & S-2* is distinguishable, because the plaintiffs in this case are prevailing parties by virtue of pre-dismissal events, not post-dismissal events. In *S-1 & S-2*, the court found that the plaintiffs did not "prevail" because post-dismissal pressure from a third party, occurring years *after* the case was ruled moot, caused the change in the defendant's policy; neither the plaintiffs' summary judgment victory nor any other settlement or enforceable judgment materially altered the legal relationship between the plaintiffs and the State defendants. (As noted above, the State defendants were not parties to the settlement in that case.) In the present case, pre-dismissal relief obtained by the plaintiffs, years *before* the case was ruled moot, caused the change in the defendant's policy. The plaintiffs' obtaining both a preliminary injunction and a partial settlement materially altered the legal relationship between the plaintiffs and the defendant, modifying the defendant's behavior in a way that directly benefitted the plaintiffs while the case still was pending and being litigated in this court. (*See* Parts II.A.2-4 *infra*.) Therefore, the *S-1 & S-2* case does not operate to bar the plaintiffs from recovering fees under § 1988.

2.

In a related argument, the defendant asserts that preliminary injunctions are not sufficiently final to establish a plaintiff as a prevailing party. The defendant urges the court to adopt a rule that would deny prevailing party status to any plaintiff who obtained a preliminary injunction but ultimately received no further final judgment on the merits of its claims. This argument ignores that the Fourth Circuit clearly has envisioned certain circumstances in which a plaintiff who has obtained a preliminary injunction may be

entitled to "prevailing party" status under § 1988, even if the plaintiff does not ultimately obtain a favorable final judgment on the merits of its claim. In *S-1 & S-2*, the court held: "[W]hen a plaintiff is successful in obtaining a preliminary injunction based on its probability of success, the defendant's voluntary cessation of unlawful conduct need not deprive plaintiffs of prevailing party status." 6 F.3d at 170 n.3 (Wilkinson, J., dissenting) (adopted by the *en banc* majority at 21 F.3d 49) (emphasis omitted).

Thus, a plaintiff may obtain prevailing party status under § 1988 without obtaining a favorable final judgment in its challenge to a defendant's alleged unlawful conduct if the plaintiff makes a two-part showing. First, the plaintiff must show that it received a preliminary injunction that was based on the plaintiff's probability of success on the merits of its challenge to the defendant's conduct. *See id.*; *see also Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997) ("[A]ttorney's fees are proper "if the court's action in granting the preliminary injunction is governed by its assessment of the merits. . . . [but] are not warranted . . . if the court has not based its decision to award interim relief on the merits."). Second, the plaintiff must show that the defendant voluntarily ceased its unlawful behavior in response to the plaintiff's litigation against the defendant, thereby depriving the plaintiff of the opportunity to obtain a favorable final judgment on the merits. *See S-1 & S-2*, 6 F.3d at 170 n.3 (Wilkinson, J., dissenting) (adopted by the *en banc* majority at 21 F.3d 49).

The plaintiffs satisfy the first showing. The court primarily based its decision to grant the plaintiffs' motion for a preliminary injunction on the plaintiffs' probability of success on the merits of their statutory claim. The court analyzed the defendant's policy in great detail, and found that it "contradicts the plain language of the applicable federal regulations." *Smyth*, 168 F.R.D. at 32. "Given the clear meaning of the regulations, impossible to square with

VDSS's contrary policy, the court finds that plaintiff likely will succeed on the merits of its statutory claim." *Id.*

The plaintiffs also satisfy the second showing. In their summary judgment motion, the plaintiffs advanced the same statutory argument they advanced at the preliminary injunction stage. As a result of the plaintiffs' likely success on the merits of that argument, the defendant entered into a partial settlement agreement with the plaintiffs one day before the hearing on the plaintiffs' summary judgment motion, and also subsequently changed his policy. By doing so, the defendant voluntarily ceased his unlawful behavior in response to the plaintiffs' litigation against him, thereby depriving the plaintiffs of the opportunity to obtain a favorable final judgment on the merits. Therefore, the plaintiffs may be considered prevailing parties by virtue of their success in obtaining the preliminary injunction.

In support of his position, the defendant cites *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980), and an unpublished case from this district, *Rahim X v. Morris*, No. Civ. A. 96-0493- R, 1997 WL 687729 (W.D. Va. 1997).[2] In *Smith*, a professor sued the University of North Carolina for wrongful termination, alleging discrimination based on age, sex, and religion. The professor was granted a preliminary injunction, which required, among other things, that her employment be continued pending the outcome of the litigation. The plaintiff ultimately lost at trial on every issue, "amounting to total victory for the University, total defeat for the plaintiff." *Smith*, 632 F.2d at

[2]The court reminds the parties that unpublished cases are not to be cited for their precedential value in this district or circuit. To the extent that *Rahim X* holds that successfully obtaining a preliminary injunction never entitles a plaintiff to prevailing party status when the plaintiff ultimately does not obtain a final judgment on the merits, it reads *Smith* too broadly and is inconsistent with the Fourth Circuit's statement in *S-1 & S-2*. *See* 6 F.3d at 170 n.3 (Wilkinson, J., dissenting) (adopted by the *en banc* majority at 21 F.3d 49).

321. Nevertheless, the district court awarded the plaintiff attorney's fees for the work relating to the preliminary injunction. The Fourth Circuit reversed, concluding that a plaintiff who loses on the merits of her claim should not be considered a prevailing party under § 1988.

The defendant argues that *Smith* stands for the proposition that obtaining a preliminary injunction never entitles a plaintiff to prevailing party status. *Smith* did not so hold. While the court ruled that a plaintiff who goes to trial and ultimately loses on the merits should not be regarded as a prevailing party when the injunction serves mainly to "preserve the status quo," 632 F.2d at 347, and "afford[] as much as possible every individual a full opportunity to litigate a claim," *id.* at 353, it distinguished situations in which a preliminary injunction addresses the merits of the case, as in the case at bar. *See id.* at 352-53. *Smith* is distinguishable because the plaintiffs in this case ultimately did not suffer "total defeat" on the merits; on the contrary, they obtained a preliminary injunction based on their probability of success on the merits. Therefore, *Smith* does not support the defendant's argument.

3.

Last, the defendant argues that the plaintiffs did not "prevail" because there was no settlement which gave the plaintiffs "some of the legal relief sought in a § 1983 action." *S-1 and S-2*, 21 F.3d at 51. In the present case, the parties entered into a binding agreement pursuant to which the defendant agreed not to seek repayment of benefits paid during the course of litigation. *See Smyth*, 88 F. Supp. 2d at 570. In the absence of such an agreement, the plaintiffs' liability to repay these funds would have remained an issue for the court to resolve despite the defendant's ultimate change of policy. *See* 45 C.F.R. § 233.20(a)(13) (1999) (requiring the State to take reasonable steps to recover overpayment of benefits). Not having to repay these funds

was part of the relief sought by the plaintiffs. As the parties entered into an agreement where the release of repayment was the consideration, that agreement was a partial settlement.

4.

The court concludes that the plaintiffs were prevailing parties in this case. In granting the plaintiffs' preliminary injunction, the court found that the plaintiffs probably would succeed on the merits on the statutory argument they ultimately made in their motion for summary judgment. As a result of that finding, and before the case was ruled moot, the defendant: (1) entered into a partial settlement agreement with the plaintiffs one day before the hearing on the plaintiffs' summary judgment motion, giving the plaintiffs some of the relief they requested, and (2) changed his policy to exempt the plaintiffs from the paternity identification requirements, giving the plaintiffs nearly all of the relief they requested, but depriving them of the opportunity to obtain a favorable final judgment on the merits. The court makes these observations not to show that the plaintiffs' lawsuit operated as a catalyst for post-litigation changes in the defendant's conduct, (as the Fourth Circuit did away with the catalyst theory in *S-1 & S-2*), but to show that, prior to dismissal of the case as moot, the plaintiff obtained a judgment against the defendant (the preliminary injunction), as well as comparable relief through a partial settlement, which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefitted the plaintiff. *See Farrar v. Hobby*, 506 U.S. 103, 111-12, (1992). Accordingly, the plaintiffs "prevailed" for the purposes of recovering fees under § 1988.

B.

The next question presented is whether the requested fees are reasonable. "[T]he district court has discretion in

determining the amount of a fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Fourth Circuit has directed district courts, in exercising their discretion, to be guided by the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974): (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained;[3] (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Daly v. Hill*, 790 F.2d 1071, 1076 n.2 (4th Cir. 1986). Applying these *Johnson* factors, the court must calculate the reasonable hourly rate and the number of hours reasonably expended on the litigation, and then multiply the rate by the hours to determine the "lodestar figure," which is "presumed to be fully compensatory without producing a windfall" to the prevailing party's attorneys. *See Trimper v. City of Norfolk*, 58 F.3d 68 (4th Cir. 1995).

The plaintiffs' fee application primarily was based on work performed by two attorneys, Steven L. Myers and Edward M. Wayland, and by a consulting professor of law from the University of Virginia, Daniel R. Ortiz. Messrs. Myers and Wayland claimed an hourly rate of $200 per hour, and Mr.

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[3]The "results obtained" factor does not conflict with the Fourth Circuit's decision to do away with the "catalyst theory" for purposes of establishing whether a plaintiff is a prevailing party under § 1988. *See Clark v. Sims*, 894 F. Supp. 868, 871 (D. Md. 1995) ("[O]nce a party has been otherwise found to be a prevailing party, catalyst theory remains available for consideration as a factor in arriving at the actual amount of the fee award, if any."); *Lucas v. Guyton*, 901 F. Supp. 1047, 1055-56 (D.S.C. 1995) ("agree[ing] entirely" with the analysis in *Clark*).

Ortiz claimed an hourly rate of $275 per hour. Messrs. Wayland, Myers, and Ortiz initially sought compensation for 440.71, 454.76, and 14.3 hours of work, respectively, totaling 909.77 hours. For time spent preparing and arguing the fee petition, Mr. Wayland added 39.42 hours, and Mr. Myers added 19.6 hours, for which they also seek compensation. The plaintiffs also seek reimbursement for their reasonable costs and related expenses. The total amount requested is $195,074.54.

1.

The court's first task is to determine the reasonable hourly rate. "The § 1988 fee applicant bears the burden of establishing the reasonableness of the hourly rates requested. Specifically, the applicant must produce specific evidence of the 'prevailing market rates in the relevant community' for the type of work for which he seeks an award." *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987). The plaintiffs may satisfy this burden by submitting "affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." *Spell*, 824 F.2d at 1402.

The plaintiff established by way of declarations that the appropriate rate for someone of Professor Ortiz's superior skill and experience is $275 per hour. The defendant does not dispute this figure, but only challenges the $ 200 rate for Messrs. Wayland and Myers. Having reviewed the declarations of Professors Ortiz and Rutherglen, the court finds that $275 per hour is an appropriate rate for Professor Ortiz. The remainder of this Part discusses the appropriate rates for Messrs. Wayland and Myers.

The defendant does not deny that Messrs. Wayland and Myers are experienced and knowledgeable in matters of welfare law and benefits. Rather, the defendant objects that the hourly rate claimed by them is unreasonable considering the customary fee in the community, the amount involved and results obtained, awards in similar cases, and the time and labor required.

The court begins by examining the customary fee in the community, the fifth *Johnson* factor. The parties do not dispute that the relevant community in this case is Harrisonburg, Virginia. To satisfy their burden, the plaintiffs submitted declarations from Messrs. Meyers and Wayland, and from various attorneys practicing in Harrisonburg and Charlottesville. In essence, the declarations state that the appropriate market rate for similarly-situated attorneys in the community is $150 to $250 per hour, and that the appropriate rate for Messrs. Meyers and Wayland is $200 per hour. The defendant does not challenge the $150 to $200 range. Rather, he states that the low-end of the range--*i.e.* $150 per hour--is more appropriate "when the only opportunity for being reimbursed for these hours is by the state's welfare agency." The defendant cites no case law in support of this proposition.

The defendant's argument is misplaced. In *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 180 (4th Cir. 1994), the Fourth Circuit stated plainly that, "to the extent that the district court may have considered the fact that taxpayers would be required ultimately to pay the fees, it employed an improper ground for denying or reducing an attorney's fee to the prevailing party under 42 U.S.C. § 1988." *See also* S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913, *and at* 1976 WL 14051 ("[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from

funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (footnotes omitted)). The court accordingly shall not reduce plaintiffs' counsel's requested rate simply because "the only opportunity for being reimbursed for these hours is by the state's welfare agency." The above-referenced declarations are consistent with the court's knowledge of the prevailing rates for similar work by similarly-experienced attorneys in the Harrisonburg area. The defendant having offered no evidence to the contrary, the court finds $200 per hour to be consistent with the customary fee for similarly-experienced attorneys who practice civil rights and public welfare litigation in the relevant community.

The defendant's next challenge to the appropriate hourly rate is based on the amount involved and the results obtained, the eighth Johnson factor. The defendant asserts that the results were unfavorable because the benefits received as a result of the preliminary injunction only amounted to a few hundred dollars per month. This argument is unconvincing, as it ignores what the plaintiffs principally sought in this case. The instant case was not an action for damages, but an action for injunctive and declaratory relief, to "prevent the defendant from denying, reducing, or terminating AFDC benefits to them or any other person similarly situated on the basis of the challenged policies and practices and requiring that their benefits . . . be paid in full pending the outcome of this litigation." (Compl. at 2 ¶ 2.) *See generally Hensley v. Eckerhart*, 461 U.S. 424, 436 n.11, (1983) (noting that "a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time"); S. Rep. No. 94-1011, at 3, *reprinted* in 1976 U.S.C.C.A.N. 5908, 5913 (1976), *and at* 1976 WL 14051 ("It is intended that the amount of fees awarded . . . not be reduced because the rights involved may be nonpecuniary in

nature."). The plaintiffs obtained nearly everything they sought from the outset of this case, as a result of the preliminary injunction, the partial settlement agreement, and the defendant's change in policy: the defendant's absolute paternity policy was revised to exclude the plaintiffs and other families with illegitimate children born before May 1996; the plaintiffs continued to receive benefits while the prior policy was in effect; the plaintiffs are not required to repay the previously-received benefits; and assuming they otherwise qualify, the plaintiffs will be entitled to receive benefits in the future even though they do not know the identity of their fathers. The defendant also argues that because plaintiffs' counsel was unsuccessful in certifying this case as a class action, the results obtained are not very favorable. This argument is no more persuasive than the last, because the defendant's change in policy affects a wide range of similarly-situated individuals--all children born prior to May 1996--even though the class was not certified. Preventing the defendant from denying benefits to similarly-situated persons on the basis of the paternity identification policy was part of the relief requested. (*See* Compl. at 2 ¶ 2.) As the results obtained in this case were excellent, the eighth *Johnson* factor favors the plaintiffs, not the defendant.

The defendant next challenges the appropriate hourly rate based on awards in similar cases, the twelfth *Johnson* factor. The parties dispute whether a case from the Eastern District, Rehabilitation Association of Virginia, Inc. v. Metcalf, 8 F. Supp. 2d 520 (E.D. Va. 1998), is similar to the case at bar. The plaintiff in *Rehabilitation Association* was an association of rehabilitation agencies that provided services to individuals who qualified for both Medicare and Medicaid. It sued the Director of the Virginia Department of Health and Human Services pursuant to 42 U.S.C. § 1983, for injunctive and declaratory relief from state laws which allegedly nullified the plaintiff's federal right to payment for services it rendered to individuals with incomes below the federal poverty levels. The plaintiff prevailed on summary

judgment, and the court of appeals affirmed. The plaintiff then sought to recover its fees under § 1988.

In assessing the reasonableness of the requested fees, the court found that the rate charged by the plaintiff's New York counsel--$380 per hour--was too high under community standards. The court proceeded to determine the reasonable rate for experienced health care attorneys in Richmond, Virginia, the market where it sits. Based on affidavit evidence and its own knowledge and experience, the court found that partners in Richmond law firms charged slightly more than $170 to $180 per hour, but that, when the health care experience of plaintiff's counsel was taken into account, "the reasonable hourly rate in Richmond for an attorney of similar experience, skill, and reputation," was $250 to $300 per hour. *Id.* at 528.

The *Rehabilitation Association* case is comparable to the case at bar. As in this case, the plaintiff filed a § 1983 action in the public welfare arena for declaratory and injunctive relief against the Director of a Virginia state agency. In granting plaintiff's counsel over $ 300,000 in fees, the court found that the reasonable rates in Richmond ranged from $170 to $300, the high-end being reasonable for a lawyer in Richmond with as much experience as plaintiff's counsel in that case. Plaintiffs' counsel in the case at bar also have extensive experience in the public welfare field, and their claimed rate--$200 per hour--falls within the range set forth in *Rehabilitation Association*. The fact that $200 is toward the low-end of that range adequately takes account of the fact that the lawyers in *Rehabilitation Association* litigated their case at the appellate and Supreme Court levels, and obtained greater monetary relief for their clients than plaintiffs' counsel in this case. The court accordingly finds that $200 per hour is reasonable when compared to the rates found reasonable in *Rehabilitation Association*.

Last, the defendant challenges the appropriate hourly rate based on the time and labor required, the first *Johnson* factor. The defendant states generally that the amount of time Messrs. Wayland and Myers spent preparing various litigation-related documents is exorbitant, given their self-proclaimed expertise in welfare issues. The defendant asserts that the plaintiffs must reduce either their claimed hours or their hourly rate, citing *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983) (stating that "a fee applicant cannot demand a high hourly rate . . . and then run up an inordinate amount of time researching the . . . law" with which they claim to be familiar). The court does not disagree with the Third Circuit's holding in *Ursic*. However, as discussed below, the court does not find that plaintiffs' counsel ran up an inordinate or unreasonable amount of time in preparing for trial. The court accordingly rejects this argument by the defendant.

The defendant does not challenge the hourly rate on the basis of any of the other *Johnson* factors. The plaintiffs correctly observe that the unchallenged factors also weigh in favor of their requested hourly rate. The questions presented were novel and difficult: only a few other states have similar paternity identification policies, very few other reported decisions concern the legality of a similar welfare reform policy, and the plaintiffs' task was complicated by the need to analyze the effect of the waivers the defendant obtained from the United States Department of Health and Human Services. Having presided over this case for four years, the court also finds that this case required a high level of skill, and that plaintiffs' counsel performed well. Plaintiffs' counsel also submitted declarations that their work on this case precluded their ability to work on other matters, and the defendant does not argue to the contrary. The time limitations imposed by the circumstances also weigh in favor of plaintiffs' counsel: as the plaintiffs "rely upon AFDC benefits to sustain themselves," *Smyth v. Carter*, 168 F.R.D. 28, 30 (W.D. Va. 1996), plaintiffs' counsel was required to

seek a temporary restraining order and a preliminary injunction early in the case. Plaintiffs' counsel also assert that this welfare reform case was politically undesirable, citing newspaper articles that described their arguments as "insane" and "psychopathic." The defendant does not disagree that this case was politically undesirable.

The court has considered all of the *Johnson* factors as they apply to this case, as well as the parties' respective positions. Having done so, and based on the evidence submitted by counsel and on its own knowledge and experience, the court concludes that a reasonable hourly rate for the work performed in this case is $200 for Messrs. Wayland and Myers, and $275 for Mr. Ortiz.[4]

2.

The court's second task is to determine whether the hours billed by plaintiffs' counsel are unreasonable. Courts must "exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting S. Rep. No. 94-1011, at 6 (1976)). The court must ascertain whether counsel for the prevailing party fulfilled their duty to exercise billing judgment "to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Id.*

Plaintiffs' counsel properly exercised billing judgment. They excluded from their petition the time spent on unsuccessful matters (such as the class certification motion),

[4]Plaintiffs' counsel distinguishes between the reasonable hourly rate for work performed, $200, and the rate for time spent traveling in connection with this litigation, which the plaintiffs assert is $100 per hour. The plaintiffs' reduction of this "travel rate" to $100 per hour evidences the good faith of their fee request. $200 being a reasonable hourly rate for the work performed, and the defendant not having challenged the $100 per hour travel rate, the court also finds this travel rate to be reasonable.

and on other unrelated issues (such as those concerning the Winchester plaintiffs, who were dismissed from the case). Plaintiffs' counsel also reduced their total hours by 10-15%, to deduct for possibly duplicative, unnecessary, or clerical work that was not otherwise accounted for.

The defendant lodges two very general arguments against the number of hours plaintiffs' counsel claim they spent on their tasks: he challenges the number of phone calls and conferences charged by plaintiffs' counsel, and argues generally that plaintiffs' counsel spent too much time on various issues. The court rejects the first argument, because plaintiffs' counsel held offices in different cities, and should not be penalized for holding conferences about a case they worked on jointly. The court also rejects the second argument. The defendant does not explain why any particular figure is unreasonable, but simply asserts that plaintiffs' counsel's hours are too high, given their experience. Although the defendant's "time summaries" purport to summarize the hours spent "preparing pleadings," the times indicated in the summaries also include hours spent preparing for argument, interviewing and preparing witnesses, researching the particular claims and defenses in this case, and preparing exhibits and declarations. As the plaintiffs correctly observe, it takes time to do a job well. The defendant vigorously opposed the plaintiffs' efforts throughout this litigation, maintaining that his policy was not inconsistent with the plain language of the applicable federal regulations. The court so notes not to fault the defendant, but to observe that the plaintiffs' efforts were justified in light of that opposition. The court finds it significant that the defendant waited until the day before oral argument on the plaintiffs' summary judgment motion to begin discussions with the plaintiffs about revising the policy. As a consequence of this timing, plaintiffs' counsel was required to spend time drafting their summary judgment briefs, and to prepare fully for oral argument on the motion. The defendant has continued to claim that no agreement existed, despite this

court's prior ruling to the contrary. Consequently, the plaintiffs have been required to expend considerable time and resources to litigate this case successfully. The court has reviewed thoroughly the declarations submitted by plaintiffs' counsel, and has considered the *Johnson* factors as they apply to the "reasonable hours" inquiry. The court finds that the plaintiffs have satisfied their burden of proving that the number of hours they expended on the litigation was reasonable.

3.

For the foregoing reasons, the court finds that $200 per hour is a reasonable rate for the legal services of Messrs. Wayland and Myers in this case, and that $275 per hour is reasonable for the services of Professor Ortiz in this case. The court also finds reasonable the 480.13 hours spent by Mr. Wayland, the 474.36 spent by Mr. Myers, and the 14.3 hours spent by Mr. Ortiz. Accordingly, the lodestar fee is $191,505.50.[5] The plaintiffs do not request that this figure be

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[5]The court arrived at the lodestar fee by multiplying the number of hours reasonably spent by Messrs. Wayland, Myers, and Ortiz, by each of their reasonable hourly rates. To calculate the total number of hours, the court added those reflected in the initial fee petition ("initial hours"), to those spent preparing and arguing the petition ("petition hours"). The initial hours consist of both "work hours" and "travel hours." (*See* note 4 *supra*.) The calculations are as follows:

For Mr. Wayland:

Hours

440.71 initial hours (421.96 work hours + 18.75 travel hours)
+ 39.42 petition work hours
= 480.13 total hours

total work hours: 461.38 (421.96 initial work hours + 39.42 petition work hours)

total travel hours: 18.75

Fees

initial work fee: 421.96 work hours x $200 per hour = $84,392
+ petition work fee: 39.42 work hours x $200 per hour = $ 7884
= total work fees: 461.38 total work hours x $200 per hour = $92,276

total travel fees: 18.75 travel hours x $100 per hour = $1875

Total Fees for Mr. Wayland: $92,276 + $1875 = $94,151

For Mr. Myers:

Hours

454.76 initial hours, (440.26 work hours + 14.5 travel hours)
+ 19.6 petition work hours
= 474.36 total hours

total work hours: 459.86 (440.26 initial work hours + 19.6 petition work hours) total travel hours: 14.5

Fees

initial work fee: 440.26 initial work hours x $200 per hour = $88,052
+ petition work fee: 19.6 petition work hours x $200 per hour = $3920
= total work fees: 459.86 total work hours x $200 per hour = $91,972

total travel fees: 14.5 travel hours x $100 per hour = $1450

Total Fees for Mr. Myers: $91,972 + $1450 = $93,422

For Prof. Ortiz:

Hours

14.3 initial work hours + 0 petition hours = 14.3 total hours

Total Fees

Total Fees for Prof. Ortiz: 14.3 total hours x $275 per hour = $3,932.50.

Combined total for Messrs. Wayland, Myers, and Ortiz:

Mr. Wayland:	$94,151 +
Mr. Myers:	$93,422 +

adjusted upward due to "exceptional circumstances." *See Daly v. Hill*, 790 F.2d 1071, 1077-78 (4th Cir. 1986).

The plaintiffs also request an award of related costs and expenses. "A prevailing plaintiff in a civil rights action is entitled, under § 1988, to recover 'those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.'" *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (quoting *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979)). Counsel for the plaintiffs itemized the out-of-pocket expenses they incurred in this matter. Initially they claimed $3511.94 in expenses, and added $57.10 for expenses incurred in preparing the instant petition. The total amounts to $3569.04, to which the defendants have not objected. The court has reviewed the statements and find the items contained therein to be reasonable. The court therefore concludes that $3569.04 in related costs and expenses should be added to the lodestar amount, resulting in a total award of $195,074.54 ($191,505.50 + $3569.04).

III.

For the reasons discussed above, the court finds that the plaintiffs are prevailing parties for the purposes of 42 U.S.C. § 1988, and that the requested fees are reasonable. The court shall grant the plaintiffs' petition, and award the plaintiffs fees in the amount of $195,074.54.

An appropriate Order this day shall issue.

Prof. Ortiz:	$3932.50
Total:	$191,505.50.

ENTERED:

s/ James H. Michael, Jr.
Senior United States District Judge

Oct. 17, 2000
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, for herself and as next friend for her minor child, Angela Smyth,	)	CIVIL ACTION NO. 5:96CV00089
and	)	
PATRICIA MONTGOMERY, for herself and as next friend for her minor child, Casey Montgomery,	)	
and	)	
LYNN WINCHESTER, for herself and as next friend for her minor children, C. Winchester and K. Winchester,	)	FINAL ORDER
Plaintiffs,	)	
v.	)	
CLARENCE H. CARTER, in his official capacity as Commissioner of the Virginia Department of Social Services,	)	JUDGE JAMES H. MICHAEL, JR.
Defendant.	)	

Upon consideration of the plaintiffs' "Petition for Attorneys' Fees, Costs, and Expenses" filed March 6, 2000, the supporting memoranda and declarations, the opposition thereto, the plaintiffs' reply, and the entire record in this case, and having heard oral argument by counsel, the court shall grant the plaintiffs' petition. For the reasons discussed in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The plaintiffs' "Petition for Attorneys' Fees, Costs, and Expenses," filed March 6, 2000, shall be, and it hereby is, GRANTED;

2. The plaintiffs shall be, and they hereby are, awarded One Hundred Ninety-Five Thousand Seventy-Four Dollars and Fifty-Four Cents ($195,074.54), pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988(b);

3. The defendant shall pay forthwith the above sum to the plaintiffs;

4. This case shall be, and it hereby is, stricken from the docket of the Court.

The Clerk of the Court hereby is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED: s/ James H. Michael, Jr.
Senior United States District Judge

Oct. 17, 2000
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, *et al.*,)	CIVIL ACTION NO. 5:96CV00089
Plaintiffs,)	
v.)	MEMORANDUM OPINION
CLARENCE H. CARTER,)	
Defendant.	JUDGE JAMES H. MICHAEL, JR.

Plaintiffs Victoria Smyth, Patricia Montgomery, Angela Smyth (Victoria's child), and Casey Montgomery (Patricia's child) are recipients of Federal welfare block grant money known as Temporary Assistance to Needy Families ("TANF") (formerly Aid to Families with Dependant Children ("AFDC")) distributed by the Commonwealth of Virginia. The defendant is the Commissioner of the Virginia Department of Social Services ("VDSS"), sued in his official capacity as administrator of Virginia's welfare program. The plaintiffs filed this action under *42 U.S.C. §1983,* challenging on equal protection and other grounds, the Commonwealth's policy requiring mothers seeking welfare to identify the fathers of their children.

Under the paternity identification requirement, a mother applying for aid under the TANF program is required to identify the children's father. The plaintiffs claim VDSS denied or reduced their benefits because the agency deemed them "noncooperative" based on their inability to provide the agency with the fathers' names. The plaintiffs allege their failure to provide VDSS with the required paternity information is justified because they do not know the identity

of their children's father. As a result, an attestation to that effect should qualify as "cooperation" as it does under the Federal regulations. The court agreed with this analysis in granting a preliminary injunction by a Memorandum Opinion and Order dated June 25, 1996. *See Smyth v. Carter, 168 F.R.D. 28 (W.D. Va. 1996).* Due to the preliminary injunction, the plaintiffs continued to receive TANF benefits from June 1996 to August 1998 when VDSS's original paternity identification policy was in effect.

Effective August 1, 1998, the defendant amended the paternity identification policy making its application prospective only. The policy is inapplicable to children born before May 1, 1996, so long as the mother attests to her lack of information regarding paternity under penalty of perjury. Both of the children in this case were born prior to that date.

In May 1998, Plaintiff Victoria Smyth requested her TANF case be closed. Subsequent to the filing of this lawsuit, but prior to leaving TANF, Smyth began receiving Social Security Disability ("SSI") benefits. Although persons who are eligible for SSI are not eligible to receive TANF benefits for themselves, they may receive benefits for their children until their eighteenth birthday. Thus, although Smyth was eligible to continue receiving TANF benefits for Angela, she voluntarily left the program.[1]

The Commonwealth filed its Motion to Dismiss initially claiming the Smyth plaintiffs no longer have standing to sue because they voluntarily withdrew themselves from the TANF program. The Commonwealth further contends the case is moot regarding the remaining plaintiffs based on the amended policy making its application prospectively only. In the alternative, the Commonwealth argues the case should be

[1]Angela was 13 years old when the lawsuit was initially filed in 1995. Thus, in 1998, when her mother voluntarily left the program, Angela would have been 16 years of age. As such, she could have received benefits for approximately two more years.

dismissed because neither declaratory nor injunctive relief is necessary to restore benefits to the plaintiffs. The Commonwealth notes that no "cognizable danger" exists to show it will revert to its prior policy. Further, the Commonwealth alleges that it waived its right to repayment of back benefits, and thus, it will not attempt to recover those benefits from the plaintiffs.

The plaintiffs acknowledge that the case is moot for prudential reasons, but request the court to recognize an agreement between the parties in which the plaintiffs allegedly agreed to continue the summary judgment hearing so that the defendant could revise the policy, in return for a waiver from the defendant to seek repayment of past benefits paid to the plaintiffs. The plaintiffs contend if the agreement is not in the dismissal order then the court would have to decide whether the defendant's policy was unlawful.

I.

Absent a ruling by the court on the merits or an agreement of the parties, the defendant has an obligation to seek repayment of the benefits paid prior to August 1998 from the plaintiffs if they are deemed ineligible to receive those benefits. *See* Va. Code. Ann. § 63.1-86.1 (West, WESTLAW through 1999 Reg. Sess.) (replacing AFDC with TANF); 45 C.F.R. § 233.20(a)(13) (1998) (requiring state programs to take reasonable steps to correct overpayment of benefits). The parties disagree about whether the defendant waived his right to seek repayment of the TANF benefits paid during this period or whether the parties entered into an agreement that the Commonwealth would not seek repayment in exchange for a non-contested continuance of the summary judgment hearing to be held September 12, 1997.

The defendant claims the Commonwealth waived its right to payments made before February 1, 1997 in its Memorandum in Opposition to Plaintiffs' Motion for

Summary Judgment, dated May 23, 1997. The Commonwealth did note in footnote 19 of the thirty-nine page brief that it no longer intended to occupy the court's time contesting the legality of the absolute paternity identification policy prior to the time Virginia received a waiver from the United States Secretary of Health & Human Services permitting the Commonwealth to have a more rigorous definition of 'cooperation' than the federal law. Thus, the defendant declined to seek repayment prior to February, 1997. Moreover, supposedly in a letter to plaintiffs' counsel dated September 12, 1997, counsel for the defendant stated the Commonwealth would not seek repayment of TANF funds paid to the plaintiffs between February 1, 1997, and the date of a rescheduled final hearing on the merits. In the Defendant's Memorandum in Support of the Commonwealth's Motion to Dismiss, the Commonwealth extends its initial waiver of May 23, 1997, allegedly without agreement from the plaintiffs and without any return of consideration, to run through August 1, 1998, the date the policy was changed.

The plaintiffs contend the parties entered into an agreement on September 11, 1997, the day before the summary judgment hearing was to be held. Allegedly, the defendant's counsel approached the plaintiffs' counsel and requested the parties agree to a continuance to allow the defendant time to revise the policy. The defense counsel allegedly offered that if the plaintiffs agreed to the continuance, the defendant would continue to pay all benefits as required by the preliminary injunction order until a new hearing could be scheduled. Further, the defendant would waive any claim to repayment of these benefits even if he ultimately prevailed on the merits. The plaintiffs request that the final dismissal order in this case clarify the defendant was, and still is, bound by this agreement.

At a status conference before this court held on April 15, 1999, the defendant represented to the court that it waived

the collection of back benefits for the period before February, 1997 in a memorandum to the court. Indeed, the court finds that the defendant did make this initial waiver. However, there appears to be a second waiver resulting from the parties' agreement to continue the summary judgment hearing. The defendant informed the court, "We agreed to a continuance on the motion. And at that point the department agreed to waive repayment from February 1, 1997 until the date of the rescheduled hearing. So, again, that was the result of an agreement." The court proceeded to ask the defendant whether the two waivers waived any claim the department had to recoup those payments. The defendant responded, "Yes ... we don't make any further assertion for those benefits or to those claims. And that was, again, a result of our agreement to waive."

In reviewing the transcript, the defendant was not troubled by the admission that the parties previously reached an agreement, but was concerned with the court ordering the parties not to seek such benefits. Indeed, the defendant asserted that "with regard to the waiver it is something that the parties agreed to without any order of the court or without any direction from the court," and further proposed that the order state "in conjunction with the parties agreement, the defendant waives any right to seek repayment." Towards the end of the status conference, the defendant again admitted "the department has no intention of collecting back benefits as a result of the agreement that the lawyers made on behalf of their respective clients." When the court asked whether there was anything wrong with reciting that in the order, the following exchange occurred:

Ms. Faulders:	Your Honor, if the language reflects it appearing that the parties have done the following and states the facts and reflects what in fact we did --
The Court:	That you agreed.

Ms. Faulders:	That we agreed that we would not seek back benefits.
The Court:	That both sides agreed.
Ms. Faulders:	Yes, sir.

Based upon the admissions made to the court during the status conference, this court finds that the parties did enter into an agreement where the defendant would receive a non-contested continuance in return for a waiver of seeking benefits paid to the plaintiffs between February, 1997 and the date the policy was revised to exclude the plaintiffs. Accordingly, the dismissal order will declare that the defendant is unable to seek repayment of TANF benefits because of the binding agreement between the parties.

II.

Article III of the Constitution limits federal courts' jurisdiction to "actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). These controversies must be 'live' controversies, "those that persist in 'definite and concrete' form even after intervening events have made some changes in the parties' circumstances." *Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974)). However, a court need not determine whether a case is moot on constitutional grounds or controversy terms if the case is treated as moot for prudential reasons. *See S-1 and S-2 v. Spangler*, 832 F.2d 294, 296 (4th Cir. 1987) (hereinafter "*Spangler*").

In *United States v. Under Seal*, 757 F.2d 600 (1985), the Fourth Circuit initially recognized that it could avoid the determination of whether a case has become moot in constitutional case or controversy terms, and instead, treat the case moot for prudential reasons. *See id. at 602.* As

authority for this undertaking, the court cited Federal Practice and Procedure by Wright, Miller and Cooper [hereinafter "FP&P"]. *See id.* In FP&P, constitutional concepts of mootness are recognized as the major foundation of the current doctrine. Accordingly, a review of the Article III threshold question of "case and controversy" is recommended before determining whether a case is moot for discretionary reasons of remedy or judicial administration. *See* 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.1, at 214-15 (2d ed. 1984). However, the authors realize that courts frequently do not draw clear lines between constitutional and prudential doctrines when determining whether a case is moot. *See id.* at 226. Moreover, they question why reliance is placed upon constitutional mootness when the doctrine is as flexible as it is and "the ordinary needs can be met by the discretionary doctrines." *Id.* at 215.

Indeed, the Fourth Circuit does not command a district court to perform the rigorous analysis of constitutional mootness if the case can be deemed moot for prudential reasons. *See Under Seal*, 757 F.2d at 602; *S-1 and S-2 v. Spangler, 832 F.2d 294, 297 (4th Cir. 1987), appeal after remand* 6 F.3d 160 (4th Cir. 1993), *rehearing en Banc, vacated on other grounds* 21 F.3d 49 (4th Cir. 1994) (declaring "we need not decide whether this development moots the case in strict constitutional case or controversy terms, because we conclude that we should treat this appeal as moot for prudential reasons"). The Fourth Circuit recognized several factors to consider when deciding whether a case is prudentially moot: (1) the court's inability to give an effective remedy because of developed circumstances; (2) the sensitivity and/or difficulty of the dispositive issue; and (3) the likelihood that the challenged act would recur and evade review. *See Under Seal,* 757 F.2d at 603; *Spangler,* 832 F.2d at 297-98.

The case at bar satisfies the three factors. First, because the plaintiffs continued to receive TANF benefits under the preliminary injunction order, they received all of the benefits they are entitled to. Thus, the court should not award any monetary damages. Further, with the paternity identification policy's amendment making it apply prospectively only, the plaintiffs are now exempt from the challenged act. Because the plaintiffs represent only themselves in this suit and not a class of women unable to identify the father of their children, an injunction would be improper in this case. Realizing this, the plaintiffs no longer seek this relief. Second, as the *Spangler* court noted, a sensitive and difficult issue arises when a court is called upon to interfere with a state administrative agency by enjoining one of the agency's policies. *See Spangler,* 832 F.2d at 298. Because the plaintiffs already received what they ultimately sought--to continue receiving benefits--it would be imprudent for the court to address the legality of the identification policy. Lastly, in both briefs submitted to this court as well as argument before it, the defendant promised not to rescind the amendment and not to seek repayment of the benefits received by the plaintiffs during the period the policy applied to them. Thus, the possibility of recurrence is unlikely. However, even if the challenged act recurred, the act would not evade review. Situations evading review include an abortion claim or a claim challenging a ten-day restraining order. *See Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir. 1994). In both illustrations the judicial process generally exceeds the time-frame of the challenged act. The present case does not produce any such time frame for the court to try such an issue. Thus, because the case at bar satisfies all three factors, combined with the fact that both parties agree the case is moot, this court finds that the case is moot for prudential reasons, and thus, elects not to address the issue of constitutional mootness.

III.

Both of the parties agree that the plaintiffs can no longer seek declaratory or injunctive relief. This assertion is the result of the change in the paternity identification policy making it apply prospectively only and the agreement between the parties that the defendant will not seek back payments awarded to the plaintiffs. For the foregoing reasons, this case is dismissed with prejudice as it is moot for prudential reasons. However, the court retains jurisdiction of the case to decide the issue of attorneys' fees.

An appropriate order this day shall issue.

ENTERED: s/James H. Michael, Jr.
Senior United States District Judge

Feb. 4, 2000
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, *et al.*,	)	CIVIL ACTION NO. 5:96CV00089
Plaintiffs,	)	
v.	)	ORDER
CLARENCE H. CARTER,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Pending before the court is the defendant's Motion to Dismiss filed on May 6, 1999. The defendant contends this case is moot and that the plaintiffs lack standing to pursue their claims. Accordingly, he requests this court to dismiss the case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. On August 24, 1999, this court heard oral arguments on the defendant's motion.

The court finds, that effective August 1, 1998, the defendant revised the paternity identification policy that was the subject of this litigation by making is application prospective only. As a result, the plaintiffs are no longer disqualified from receiving benefits under the Temporary Assistance to Needy Families Act ("TANF") as a result of their inability to name the fathers of their children who are parties to this case.

The court further finds that the defendant may not seek repayment of TANF benefits paid to the plaintiffs under the prior policy. The defendant, in his Memorandum in

Opposition to the Plaintiff's Motion for Summary Judgment, made an initial waiver of the repayment of TANF benefits paid before February 1, 1997. By agreement of the parties and in exchange for a continuation of the summary judgment hearing, the defendant extended that waiver so as to include all TANF benefits paid through August 1, 1998, at which time the revised paternity identification policy went into effect. Accordingly, it is this day

ADJUDGED AND ORDERED

that:

(1) the court finds that this case is MOOT FOR PRUDENTIAL REASONS and that the court lacks jurisdiction over this matter;

(2) the court GRANTS the defendant's Motion to Dismiss and DISMISSES this case WITH PREJUDICE;

(3) the court DISMISSES the plaintiff's Motion for Summary Judgment filed July 31, 1996 as MOOT;

(4) the court reserves jurisdiction to decide (a) whether the plaintiffs are entitled to any award of attorneys' fees and costs in this case, and (b) if they are so entitled, the amount of any such award;

(5) the plaintiffs shall have thirty (30) days from the entry of this Order to file their Petition for Attorney's Fees;

(6) the defendant shall have thirty (30) days from service of such petition to file his Memorandum in Opposition; and

(7) the plaintiff shall then have fifteen (15) days from service of such Memorandum in Opposition to file their Reply Memorandum.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: s/James H. Michael, Jr.

Senior United States District Judge

Feb. 4, 2000

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, *et al.*,)	CIVIL ACTION NO. 96-0089-H
Plaintiffs,)	
v.)	MEMORANDUM OPINION
CLARENCE H. CARTER,)	
Defendant.	JUDGE JAMES H. MICHAEL, JR.

Plaintiffs Victoria Smyth, Patricia Montgomery, Angela Smyth (Victoria's child), and Casey Montgomery (Patricia's child)[1] are recipients of Aid to Families with Dependent Children ("AFDC"). Defendant is the Commissioner of the Virginia Department of Social Services ("VDSS"), sued in his official capacity as administrator of Virginia's AFDC program. Plaintiffs allege a violation of the Social Security Act 42 U.S.C. § 601 *et seq.* ("SSA"), the federal regulations promulgated under the SSA, and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs claim that VDSS has denied or reduced their AFDC benefits because the agency has deemed them "noncooperative" because they have not provided the agency with the name of their children's father. According to plaintiffs, their failure to provide VDSS with the required paternity information is justified because they neither know

[1] Plaintiffs are proceeding in this action under pseudonyms, because of the sensitive nature of the inquiry regarding the paternity of minors. Plaintiff Lynn Winchester and her children, C. Winchester and K. Winchester, were originally also parties to this suit, but have subsequently dropped out as named plaintiffs.

nor can ascertain the identity of their children's father.[2] Plaintiffs argue that the SSA and its accompanying regulations require them only to provide information that they know or reasonably can obtain. Plaintiffs contend that so long as they engage in a diligent investigation and tell the VDSS everything they know in connection with paternity, they have fulfilled their obligation to cooperate with the agency to the extent required by federal law. Plaintiffs argue that VDSS cannot, consistent with SSA, deem them "noncooperative" based upon their failure to provide paternity information if they are unable to provide it. Further, plaintiffs maintain that even aside from the SSA, defendant violates federal law by distinguishing between women who know the name of their children's father and those who do not. Because the latter qualify for public assistance while the former are denied benefits, plaintiffs discern unconstitutional discrimination against illegitimate children, in violation of the Equal Protection Clause.

Plaintiffs move the court for a preliminary injunction to enjoin defendant from denying benefits to AFDC applicants or recipients who neither know nor can ascertain paternity. Plaintiffs also ask the court to certify them as a class.

For the reasons stated below, plaintiffs' motion for a preliminary injunction is granted, and plaintiffs' motion for class certification is denied.

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[2] Plaintiff Smyth asserts that she was heavily involved with alcohol and had sexual relations with several men at the time of her child's conception. She cannot identify any of her past sexual partners as her child's father at this time. Plaintiff Montgomery provided VDSS with two names, but both men were eliminated as possibilities after blood tests were conducted; subsequent efforts to ascertain the identity of the only other man Plaintiff Montgomery claims could be her child's father have been fruitless.

I.

Plaintiffs' motion for a preliminary injunction is governed by the test set forth in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977), pursuant to which four factors must figure into the court's analysis, the weight given to each depending on the strength of the other factors. First, the court must make a determination that plaintiff will suffer irreparable injury if he does not receive injunctive relief. Once this finding has been made, the court must assess the likelihood of harm to the defendant if the court issues an injunction against him and then balance this harm against the injury the plaintiff will suffer if the court denies his motion for injunctive relief. Subsequently, the court must establish that the plaintiff is likely to succeed on the merits, or if the balance in the previous step clearly favors the plaintiff; the court need only satisfy itself that the plaintiff has raised substantial and serious questions on the merits. Finally, the court should consider whether public interest favors injunctive relief. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994) (quoting Direx Israel LTD. v. Breakthrough Medical Corp., 952 F.2d 802, 812-13 (4th Cir. 1991).

In this case, one need not search long to find irreparable injury to plaintiffs. They are poor enough to have qualified for public assistance. They rely upon AFDC benefits to sustain themselves. Most importantly, plaintiffs have children, who will suffer through no fault of their own without government aid. See Powell v. Austin, 423 F. Supp. 533, 535 (E.D. Va. 1976) (citing Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)). Counsel for defendant candidly conceded that the present policy of VDSS would in fact deprive some children of aid from the AFDC program. Defendant undertakes to justify this adverse effect on some children by arguing some sort of "balancing test" by

which the objectives of the agency might be accommodated, though admittedly at a cost to these children. As defendant argues, his new policy may very well assist VDSS in ultimately determining paternity in some cases where the AFDC applicants or recipients initially refuse to provide the agency with the information although it is in their possession. As discussed below, however, the intent of Congress in adopting the AFDC program was to provide some minimal assistance to children. That aid to children must be the polestar to which this court must look for its guidance, even if doing so may to some degree undercut the efforts of defendant in establishing paternity in some cases. While it is presently not certain how many children would be adversely affected by defendant's policy, the best information presently available indicates more than a "de minimis" number. This analysis leads to the conclusion that these plaintiffs--and their children--will suffer irreparable injury.

The countervailing harm to defendant consists mainly of the financial and administrative burden VDSS would bear should a preliminary injunction issue. Despite defendant's protestations to the contrary, the economic cost that would have to be incurred by defendant to comply with a preliminary injunction, although certainly not nonexistent, would not be unduly severe. A preliminary injunction is a temporary measure, and such burdens as may be imposed pursuant to it would be of limited duration. Moreover, little less than one year ago, before the policy of VDSS was changed, the agency in fact granted AFDC benefits to all otherwise eligible applicants who attested that they neither knew nor could reasonably ascertain paternity. Hence, the agency presumably is fully familiar with operating its program in this manner; the learning curve will not be steep. For purposes of a preliminary injunction, return to this policy will require not much more than promulgation of the reversal to the agency's staff and, of course, disbursement of funds to otherwise qualified AFDC applicants or recipients. At the very least, the court doubts that an enormous number of staff

hours and computer time will be expended to make the necessary adjustments. Defendant reminds the court that it will likely be unable to recover any funds paid over to plaintiffs, should he subsequently prevail on the merits. Just as plaintiffs' poverty might effectively bar defendant from recouping the funds, so the Eleventh Amendment would probably preclude plaintiffs from recovering any benefits rightfully due them. Weighing the harm from wrongful expenditure of funds by VDSS against that resulting from the erroneous denial of funds to plaintiffs yields a balance decidedly in favor of plaintiffs. Either children or a state agency will take a hit, and this court believes that under defendant's program a child would feel the heavier blow.

At this stage of the litigation, it appears to the court that plaintiffs will likely succeed on the merits. Because Virginia receives federal funding in administering its VDSS program, it is bound by certain provisions of the SSA. Relevant to this case is the requirement that

> [a] State plan . . . must provide that, as a condition of eligibility for aid, each applicant or recipient will be required . . . to cooperate with the State (i) in establishing paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, . . . unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate. . . .

42 U.S.C. § 602(a)(26)(B).

Federal regulations define cooperation in establishing paternity, in pertinent part, to include providing information "known to, possessed by, or reasonably obtainable by the applicant or recipient," and "providing information, or

attesting to the lack of information, under penalty of perjury . . . ." 45 C.F.R. § 232.12(b).

This language clearly operates to preclude states from disregarding an attestation to lack of information by an AFDC recipient or applicant and has been so interpreted. As the court in Tomas v. Rubin, 926 F.2d 906, 910 (9th Cir. 1991), stated.

> to give meaning to the inclusion of the attestation in definition of cooperation, an attestation of lack of information should create a presumption of cooperation that may be overcome by showing that the attestation was false, or that the applicant failed to cooperate in [another] respect[] under 45 C.F.R. § 232.12(b)

See also Doston v. Duffy, 732 F. Supp. 857, 871 (N.D. Ill. 1988) (stating that a policy that deems AFDC recipients or applicants noncooperative even if they have attested under oath to lack of information violates 45 C.F.R. § 232.12(b)).

Defendant concedes that unless an AFDC recipient or applicant supplies VDSS with information on paternity she will be denied benefits for noncooperation, even if she offers to attest that she does not know who is the father of her child and has no reasonable means of obtaining the information.

Although this policy contradicts the plain language of applicable federal regulations, defendant argues that his policy nonetheless conforms to the dictates of federal law. Defendant invites the court to engage in unwarranted judicial activism when he asks the court to accept an interpretation of federal regulations in defiance of their plain meaning. First, defendant urges that the words in the regulations cannot mean what they say because of the absurd result to which their plain meaning would lead. The so-called absurdity is that women alleging rape are required by the regulations to corroborate their claim, 45 C.F.R. § 232.43, whereas women

who engage in consensual sex would escape with a mere attestation. But this outcome is not necessarily illogical. The United States Department of Health and Human Services ("HHS"), the agency charged with implementing the pertinent regulations, may very well have believed that rape would be easier to corroborate than ignorance of paternity. Defendant's second argument is based on what defendant believes to be HHS's view of the regulations at issue, as allegedly expressed during negotiations between HHS and Virginia. Counsel for defendant made certain representations concerning negotiations with HHS. The court accepts the representations of counsel as being an accurate summary of defendant's understanding of HHS's position. According to defendant, HHS assured Virginia that it did not need to obtain a federal waiver from 45 C.F.R. § 232.12(b) to implement its current policy now in dispute; from this defendant infers that HHS construes § 232.12(b) consistently with VDSS. The court, however, cannot ignore officially promulgated regulations in favor of a nonbinding opinion expressed by an HHS official during private negotiations. Finally, defendant makes some noise about a waiver Virginia has obtained from HHS that permits VDSS to sanction for noncooperation (a waiver from § 402(a)(26) and accompanying regulations). This waiver, clearly, sheds no light on the case before the court, where the main issue turns on how noncooperation must be defined. Given the clear meaning of the regulations, impossible to square with VDSS's contrary policy, the court finds that plaintiff likely will succeed on the merits on its statutory claim.[3]

Finally, the court finds that it would be in the public interest to continue payment of benefits to otherwise eligible AFDC applicants or recipients who attest that they neither

[3] The court does not reach the question whether plaintiffs are likely to succeed on their Equal Protection claim given its finding that plaintiffs will likely prevail on their statutory claim.

know nor can ascertain paternity, but this court cannot in this matter sit to judge the morality of plaintiffs. Nothing that the court undertakes here is in any way to be construed as condonation or acquiescence in what is alleged to be the conduct of plaintiffs. Having said that, it nonetheless must be the obligation of this court to analyze this matter only in terms of the applicable federal statute, federal regulations, and state regulations. Congressional intent, as identified and delimited by the regulations of HHS, must govern the court in its analysis of the issues here. That purpose, as manifested in the AFDC program is to secure basic subsistence for children whose parents' financial status qualifies them for public assistance. Although the public has a very significant interest in welfare reform that discourages irresponsible behavior, the more immediate and pressing need is to help the children, not to punish them and their parents.

Given that all four Blackwelder factors cut in favor of plaintiffs, the court finds that they are entitled to a preliminary injunction, enjoining defendant from denying plaintiffs AFDC benefits based solely on their inability to provide VDSS with paternity information after they have attested to a lack of information.

II.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs seek certification for a class consisting of

> all children in Virginia who were born out of wedlock and their mothers, whose families have been or will be subjected to loss of cash assistance or other [AFDC] benefits and services . . . because such mothers have failed, or will in the future fail, to provide requested information about the fathers of such children where such mothers do not know or possess, and cannot reasonably obtain the requested information.

Pls.' Mem. in Supp. of Class Certification at 2.

Rule 23(a) contains four prerequisites to class certification including (1) that the class be so numerous as to make joinder impracticable, (2) that there be questions of fact or law common to the class; (3) that the claims of the named plaintiffs be typical to those of the class; and (4) that the named plaintiffs will fairly and adequately protect the interests of the class.[4]

Because the court finds that the named plaintiffs cannot adequately represent the class, there is no need to determine whether plaintiffs can otherwise satisfy Rule 23. Plaintiffs no doubt have a personal stake in the litigation and have no obvious personal conflict with the other potential class members. Nor are there any questions regarding the competency of counsel. Nonetheless, there appears to be a history of misrepresentation and perhaps dishonesty, as well as some evidence of a lack of understanding of this case on the part of plaintiffs that cannot be compensated by the enthusiasm of their lawyers. The named plaintiffs in a class action need not be the best representatives of the class, and to say that they are not expected to understand every detail of their case is to understate the matter. Still, they must be able, at minimum, to make important nondelegable decisions about the course of the litigation; also, if the named plaintiffs are evasive, untruthful, or lack credibility, this weighs heavily against them as adequate class representatives. See Greene v. Brown, 451 F. Supp. 1266, 1275-76 (E.D. Va. 1978) (denying to permit class representation by "a person lacking either in candor or in understanding" who was "not willing to be entirely open and candid in discovery" despite capabilities of her attorney).

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[4] Plaintiffs seeking class certification must also satisfy one of the requirements in Rule 23(b).

In the present case, Plaintiff Smyth has, at best, understated her monthly expenditures to VDSS on a welfare application, used a false name on a rental application to obtain an apartment; misrepresented her living arrangement to an elementary school she wanted her child to attend; and evasively answered deposition questions about her personal relationships (put in issue by this lawsuit). Plaintiff Montgomery has been untruthful with VDSS about the paternity of one of her children (Casey) and herself expressed a lack of understanding regarding this litigation--it seemed "weird" to her and she "really didn't understand it." Depositions of both plaintiffs have revealed an unwillingness to take on responsibility--for instance, Plaintiff Smyth quit a job because the house in which she worked was filthy and smelled, and Plaintiff Montgomery declared that she would not be able to assume even the responsibility of babysitting a neighbor's child.

The court does not recount these facts to pass moral judgment, but only to explain that plaintiffs' misrepresentation and irresponsibility might very well harm the interests of the class members they seek to represent. Therefore, the court cannot certify a class represented by these plaintiffs.

An appropriate Order shall this day issue.

ENTERED: s/ James H. Michael, Jr.
Senior United States District Judge

June 25, 1996
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

VICTORIA SMYTH, *et al.*,)	CIVIL ACTION NO. 96-0089-H
Plaintiffs,)	
v.)	ORDER
CLARENCE H. CARTER,)	
Defendant.	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

(1) Plaintiffs' motion for a preliminary injunction shall be, and it hereby is, granted. Defendant shall be, and he hereby is, enjoined from denying plaintiffs benefits to which they are otherwise entitled after they have provided information known to them or reasonably obtainable by them or have attested under penalty of perjury that they lack information and cannot reasonably obtain information regarding paternity.

(2) Plaintiffs' motion for class certification shall be, and it hereby is, denied.

It appearing to the court that plaintiffs in this case--otherwise eligible for welfare benefits because of their

financial status--are not able to post bond pursuant to Fed. R. Civ. P. 65(c), the requirement for posting of bond shall be, and it hereby is, waived.

The Clerk of the Court is hereby directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTERED:

s/ James H. Michael, Jr.
Senior United States District Judge

June 25, 1996
Date

UNITED STATE COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(FILED March 19, 2002)

No. 00-2453
CA-96-89-5

VICTORIA SMYTH, for herself and as next friend for her minor child, Angela Smyth; PATRICIA MONTGOMERY, for herself and as next friend for her minor child, Casey Montgomery

Plaintiffs—Appellees

v.

SONIA RIVERO, in her official capacity as Commissioner, Virginia Department of Social Services

Defendant—Appellant

On Petition for Rehearing and Rehearing En Banc

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner

Clerk

Supreme Court, U.S.
FILED
SEP 17 2002
OFFICE OF THE CLERK

(2)

No. 01-1848

IN THE
Supreme Court of the United States

VICTORIA SMYTH, ET AL.,
Petitioners,

v.

SONIA RIVERO,
Commissioner of the Virginia
Department of Social Services,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF UNDER RULE 15.8

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September 17, 2002

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PETITIONERS' SUPPLEMENTAL BRIEF UNDER RULE 15.8

A NEW NINTH CIRCUIT DECISION CONCLUSIVELY DEMONSTRATES THAT THERE IS A POST-*BUCKHANNON* SPLIT ON THE QUESTION PRESENTED — WHETHER A PRELIMINARY INJUNCTION CAN EVER TRIGGER "PREVAILING PARTY" STATUS UNDER FEDERAL FEE-SHIFTING STATUTES.

On August 20, 2002, the United States Court of Appeals for the Ninth Circuit decided *Watson v. County of Riverside*, ___ F.3d ___, 2002 U.S. App. LEXIS 16693. That court summarized its ruling as follows:

> We hold today that a plaintiff who succeeds in obtaining a preliminary injunction can be deemed a "prevailing party" for purposes of 42 U.S.C. §1988, even though he did not recover other relief sought in the lawsuit.

This ruling is directly contrary to the Fourth Circuit's ruling below, which held that a preliminary injunction entered under circumstances indistinguishable from those in *Watson* "does not satisfy the prevailing party standard of §1988(b)." *Smyth v. Rivero*, 282 F.3d 268, 277 (2002), Appendix to Petition for a Writ of Certiorari, A-1, A-15. Indeed, under the Fourth Circuit's holding, there are no circumstances under which a preliminary injunction would make a plaintiff a prevailing party. Whether the Fourth Circuit erred on this point is the first of the questions presented for review by this Court in the Petition for a Writ of Certiorari.

The situation involved in *Watson* and *Smyth* is a common one. When a court enters a preliminary injunction, the

defendant often concedes the point and alters its conduct, *i.e.*, there is a "chang[e] [in] the legal relationship between [the plaintiff] and the defendant," *Buckhannon Board & Care Home v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 604 (2001), quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989). This is especially true if the court has found that the plaintiff is likely to succeed on the merits. When this happens, the case is typically dismissed without a final judgment, because the dispute is now moot. This is an often-repeated scenario, and it is very important, therefore, that the split in the approaches taken by the circuit courts to this issue be resolved by this Court.

In *Watson*, a police officer brought an action seeking to bar the use at an administrative personnel hearing of a written statement he had prepared. 2002 U.S. App. LEXIS 16693, at *2-4. He argued that his right to due process was violated when he was forced to prepare this statement without the opportunity to consult with an attorney. The district court issued a preliminary injunction prohibiting the County from using the statement at the hearing, and it was not used. Ultimately, the district court granted summary judgment to the County on most other issues, but concluded that Watson's claim for injunctive relief presented triable issues. Since the administrative hearing had been held and ended long before, however, the court determined that the due process issue was moot and did not enter any final injunction for Watson on that issue. In finding that Watson was the prevailing party, the district court concluded that he had

> achieved "some of the benefit [he] sought in bringing suit" by obtaining an injunction prohibiting the admission of the arrest report at the hearing. [Citing *Texas State Teachers*, 489 U.S. at 791-92]. Moreover, the injunction

> altered the legal relationship between the parties because it precluded the defendants from using the arrest report, which they otherwise would have been able to use, in the hearing.

2002 U.S. App. LEXIS 16693, at *5. The Ninth Circuit affirmed, stating "The district court did not err in ruling that Watson was a 'prevailing party' in these circumstances." *Id.*, at *7, because "Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit," *Id.* at *8.

The same analysis should apply here in evaluating whether Petitioners are "prevailing parties" because they also obtained their relief in this action as a result of a preliminary injunction awarded to them by the district court: They sought to keep the state from terminating their welfare assistance, and the district court, over the state's vigorous objection, ordered the state to continue the payments. The Petitioners then received those disputed benefits for over two years under the terms of that injunction, benefits the state ultimately conceded that the Petitioners would be entitled to keep. Put differently, if the Ninth Circuit rule had applied here, Petitioners would have been deemed "prevailing parties" eligible for a fee award.

The Ninth Circuit specifically considered the impact of *Buckhannon* and concluded that its decision was fully consistent with that case:

> A preliminary injunction issued by a judge carries all the "judicial imprimatur" necessary to satisfy *Buckhannon*. In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason and for one reason only: because Judge Timlin said so. . . .[U]nder *Buckhannon*, [Watson] was

> not a mere catalyst of an extra-judicial voluntary change in conduct. There was nothing voluntary about the County's inability to use the report.

2002 U.S. App. LEXIS 16693, at *10. Similarly, in *Smyth*, the state was prohibited from terminating the Petitioners' benefits "for one reason and for one reason only: because [the judge] said so." And, similarly, the Petitioners were not mere catalysts of "an extra-judicial voluntary change in conduct. There was nothing voluntary about" the state's decision to continue paying benefits to the Petitioners.

There is no question, therefore, that *Smyth* and *Watson* present the same issue regarding "prevailing party" status. And there is no question that those two decisions reached opposite conclusions.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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